Mich. Wayne

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Oct. 2. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 583.

EDGAR L. GRAY, PLAINTIFF IN ERROR,

vs.

WILLIAM BLANCHARD, JOHN J. BORLAND, AND H. G. BILLINGS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 23, 1877.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Michigan, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the circuit court before you between William Blanchard, John J. Borland, and Horatio G. Billings, plaintiffs, and Edgar L. Gray, defendant, a manifest error has happened to the great damage of the said Edgar L. Gray, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings

2 aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 19 day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan,
By A. B. CARRIER, *Deputy.*

Allowed by—

S. C. WITHEY,
Dist. Judge.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that a copy of the foregoing writ of error was lodged in the office of the clerk of the circuit court of the United States for the western district of Michigan, for the said William Blanchard, John J. Borland, and Horatio G. Billings, defendants in error, on the 21st day of July, A. D. 1877.

Dated 21st day of July, 1877.

CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Western District of Michigan,
By A. B. CARRIER, *Deputy.*

3 WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that the copy of the writ of error above mentioned was on the day of July, A. D. 1877, by me delivered to , esq., one of the firm of Hughes, O'Brien & Smiley, who were attorneys in said circuit court for said William Blanchard, John J. Borland, and Horatio G. Billings in this cause mentioned in the within writ of error.

Dated day of July, 1877.

Clerk of the Circuit Court of the United States for the Western District of Michigan.

(Indorsed:) Supreme Court of the United States. Edgar L. Gray, plaintiff in error, vs. William Blanchard et al., defendants in error. Writ of error. Received & filed Jul' 21, 1877. C. B. Hinsdill, clerk. Gray and Luton, attorneys for pl'ff in error. Blair, Stone & Kingsley, of counsel.

4 UNITED STATES OF AMERICA, *ss:*

To William Blanchard, John J. Borland, and Horatio G. Billings, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein Edgar L. Gray is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected and speedy justice should be done to the parties in this behalf.

In witness whereof I have hereunto set my hand and seal at the city of Grand Rapids, Michigan, this 21st day of July, A. D. 1877.

S. L. WITHEY,

District Judge of the District Court of the United States for the Western District of Michigan, sitting in said Circuit Court.

5 UNITED STATES OF AMERICA,

Western District of Michigan, Kent County, ss:

Willard Kingsley, of the city of Grand Rapids, Michigan, being duly sworn, deposes and says, that on the 21st day of July, 1877, he served a true and compared copy of the within citation upon Messrs. Hughes, O'Brien, and Smiley, who are and were attorneys of record for William Blanchard, John J. Borland, and Horatio G. Billings in the said circuit court of the United States for the western district of Michigan in the said cause mentioned in said citation, by delivering the same to Thomas J. O'Brien, esq., of the firm of Messrs. Hughe', O'Brien, & Smiley aforesaid.

WILLARD KINGSLEY.

Subscribed and sworn to before me this 21st day of July, A. D. 1877.

A. B. CARRIER,

Notary Public.

(Indorsed:) Supreme Court United States. Edgar L. Gray, plaintiff in error, vs. William Blanchard et al., defendants in error. Citation. Received & filed Jul' 21, 1877. C. B. Hinsdill, clerk.

6 Supreme Court of the United States.

EDGAR L. GRAY, PLAINTIFF IN ERROR,
vs.
WILLIAM BLANCHARD, JOHN J. BORLAND, AND Horatio G. Billings, defendants in error.

Know all men by these presents that we, Edgar L. Gray and John H. Simmons, of Newaygo, Michigan, and Martin L. Sweet, of Grand Rapids, Michigan, are held and firmly bound unto William Blanchard, John J. Borland, and Horatio G. Billings, of Chicago, State of Illinois, in the sum of three thousand dollars, to be paid to the said William Blanchard, John J. Borland, and Horatio G. Billings, their executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 20th day of July, 1877.

Whereas the above-named Edgar L. Gray hath prosecuted a writ o- error to the Supreme Court of the United States to reverse the judgf

ment rendered in the above-entitled action by the circuit court of
7 the United States for the western district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Edgar L. Gray shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

EDGAR L. GRAY. [L. S.]
JOHN H. SIMMONS. [L. S.]
MARTIN L. SWEET. [L. S.]

Sealed and delivered in the presence of—
GEO. GRAY, JR.

I hereby approve of the foregoing bond in amount, form, and sureties. Dated Grand Rapids, 21st day of July, A. D. 1877.

S. L. WITHEY,
Dist. Judge.

(Indorsed:) Supreme Court of the United States. Edgar L. Gray, plaintiff in error, vs. William Blanchard et al., defendants in error. Bond. Received & filed Jul' 21, 1877. C. B. Hinsdill, clerk.

8 STATE OF MICHIGAN:

The circuit court for the county of Newaygo.

STATE OF MICHIGAN,
Newaygo County, ss:

William Blanchard, John J. Borland, and Horatio G. Billings, who are co-partners, doing business under the firm name and style of Blanchard, Borland and Co., at Chicago, Illinois, and who are each and all citizens of the State of Illinois, plaintiffs herein, by Hughes, O'Brien and Smiley, their attorneys, complain of Edgar L. Gray, of Newaygo, in said district, and who is a citizen of the State of Michigan, in a plea of trespass on the case upon promises.

For that, whereas, heretofore, to wit, on the 13th day of September, A. D. 1872, to wit, at Newaygo, in said State, in consideration that Amasa B. Watson and John Oliver would enter into the contract and agreement hereinafter mentioned between them and the said Gray, and would agree to perform all the covenants and agreements by them to be performed in and by the terms of the said contract, the said Gray of the one part with the said Watson and Oliver of the other part entered into a certain contract in writing, in the words and figures following, to wit:

9 This memorandum of agreement, made this 13th day of September, A. D. 1872, by and between Edgar L. Gray, of Newaygo, in Newaygo Co., Michigan, and Amasa B. Watson and John Oliver, of Chicago, Illinois, witnesseth:

That, whereas the said Edgar L. Gray is about to cut off and prepare for sawing, a quantity of fine saw logs from certain lands lying upon or adjacent to the Marquette River, or its tributaries, in the State of Michigan; said logs to be properly scaled and banked, and delivered during the sawing season of 1873 at the mill of Jno. Bean, or some other suitable saw mill, located at Ludington, on Pere Marquette Lake, in the State of Michigan; and at such mill to be manufactured into lumber suitable for sale on the Chicago market. And whereas said Gray is

desirous that said Watson and Oliver shall make advances upon said logs, to be repaid out of the proceeds of the lumber manufactured there, from or according to the tenor of certain promissary notes hereinafter described:

10 Now, it is agreed that said Grey, during the season of 1872–3, shall cut, scale, and bank, from the lands aforesaid, a quantity not less than five millions (5) feet, board measure, of pine saw logs, and that, as fast as the same can be done, in the spring and summer of 1873 or fall of 1872, cause to be manufactured therefrom, at the mill or mills aforesaid, not less than five million feet, board measure, of lumber suitable for the Chicago market, and as fast as the same shall be manufactured ship the same to Chicago, Illinois, by lake vessels consigned to said Watson and Oliver for sale.

The said Watson and Oliver, in consideration of the promises, agreed to advance to said Grey the following sums of money, to wit: on the execution of this agreement the sum of two thousand dollars ($2,000), on the first day of October, A. D. 1872, the sum of two thousand dollars ($2,000); on the first day of January, A. D. 1873, the sum of three thousand dollars ($3,000), and on the first day of February, A. D. 1873,

11 the sum of ($2,000) two thousand dollars.

Provided further, that the advance above specified to be paid on the first day of January and February, A. D. 1873, together with the sums previously advanced shall not exceed in amount at the rate of two dollars (2) per thousand feet on all logs cut, scaled and banked, as specified in this contract at the dates above specified for said payments to be made, for which several amounts so advanced said Grey is to execute his promissory notes, due 90 days after date respectively, and out of the same to allow and pay discount at the rate of ten per cent. per annum, of which said notes those coming due prior to May 1st, 1873, said Watson and Oliver agree, shall be r*emove*d at ninety days' time, from time to time, as the same shall come due, so that none of them shall require to be paid prior to May 1st, 1873, said Grey paying expenses of renewal and discount at the rate of ten per cent. per annum at the time of

12 each renewal.

The said Watson and Oliver, on receipt of the lumber manufactured from said logs, are to sell the same on the Chicago lumber-market by the cargo for the best price they can obtain, and from the proceeds to pay, first, the freights, tallying and measuring, tow bills, &c., on said lumber; second, their commission for sales, at the rate of two and one-half per centum on the gross amount of the sales; third, to remit to the said Gray or his order the amount of his saw bill for sawing said lumber so sold; and, fourth, the balance to be retained by said Watson and Oliver to be applied on the payment and discharge of the notes aforesaid as they respectively become due until all shall be paid, any further balance of said sales to be paid to said Gray or order on demand.

It is further agreed that in case said Gray shall fail to manufacture and consign to said Watson and Oliver the amount of lumber hereinbefore named, during the season of navigation of 1873, that then

13 for any deficiency in such amount, he shall pay to said Watson & Oliver at the rate of forty cents (40) per thousand feet, which sum they may retain out of any money in their hands arising from sales, and for which said Gray shall be liable in addition to said notes, if any remain unpaid.

It is further agreed that all logs put in by said Grey under this agreement shall be plainly marked in the usual manner of marking logs with

some one of the marks following, to wit: A, which said marks shall be duly recorded in the proper office of the locality where said logs are cut.

It is further agreed that in case any of the logs so put in by said Grey under this agreement shall be owned by him jointly with others, then the amount to be advanced on said logs shall be estimated only upon said Grey's actual interest in the same.

It is further agreed that the said Watson and Oliver, as security for the repayment of the advances made by them under this
14 agreement and the notes given therefore, shall have and be entitled to assert and claim a lien upon any and all logs cut, scaled, and marked by said Grey under this agreement, and the lumber manufactured therefrom, which lien they may enforce and maintain in any and all lawful ways, until said advances and the notes given therefor shall be paid.

And it is further agreed that said Grey shall make and execute to said Watson & Oliver, when so requested by them, a chattle mortgage on any or all logs put in under this agreement for a sum sufficient to cover any advances made thereon.

In witness whereof the said parties have hereunto set their hands the day and year first aforesaid.

EDGAR L. GREY.
A. B. WATSON.
JOHN OLIVER.

15 And for that whereas also afterwards, to wit, on the 20th day of November, A. D. 1872, to wit, at Newaygo, aforesaid, the said Grey in consideration of the premises and that the said Oliver & Watson would agree to preform and preform all the covenants and agreements by them to be preformed in the contract and agreement next hereinbefore mentioned and set forth, entered into and signed and delivered a certain contract in writing with the said Watson and Oliver as a supplement and addition to the said contract hereinbefore mentioned of date September 13th, A. D. 1872, which said additional and supplemental contract was annexed to said first-mentioned contract, and was in the words and figures following, to wit:

Memorandum made this 20th day of November, A. D. 1872, witnesseth:

That whereas the within-named Edgar L. Grey has now on hand one million feet of pine saw logs and lumber at Ludington, Mich., not cut under the within contract, it is hereby agreed that the said one million feet of logs and lumber shall be added to amount of logs
16 provided for in the within contract and the product thereof shipped and sold in the same way and upon the same terms as specified within. And it is further agreed that said Watson & Oliver shall advance to said Grey the sum of twenty-four hundred dollars ($2,400) as follows, to wit: One thousand dollars this day and fourteen hundred dollars on the 15th day of January, A. D. 1873, to be secured and repaid in the same manner as the advances provided in the within contract; said logs are marked for identification in the same manner as the logs provided for in the within contract, and the provision in said contract for a lien upon the logs shall also apply to the logs and timber herein named.

Witness our hands the day and year first above written.

E. L. GREY.
A. B. WATSON.
JOHN OLIVER.

And afterwards, to wit, on the 16th day of December, A. D. 1872, the said Grey, in consideration that the said plaintiff would assume and did assume the performance of the said contract hereinbefore men-
17 tioned, agreed and consented that the said contracts might be assigned by said Watson & Oliver from all obligations thereunder, which said agreement was in writing signed by said Grey and is in the words and figures following, to wit:

I hereby consent that the foregoing contracts may be assigned by Watson and Oliver to Blanchard, Borland & Co., of Chicago, Ills., and I hereby release said Watson & Oliver from all obligations under said contracts.

Dated Newaygo, Dec. 16th, 1872.

E. L. GRAY.

And therefore afterwards, to wit, Dec. 26th, A. D. 1872, in consideration of the said consent and release and of the sum of one dollar, the said Watson and Oliver did assign all their claim and interest in and to the said contract of September 13th, A. D. 1872, with its modifications and supplements aforesaid, to the said Blanchard, Borland & Co., which said assignment was in writing, signed by the said Watson and Oliver, and is in the words and figures following, to wit:

In consideration of one dollar in hand paid by Messrs. Blanchard, Borland & Co., of Chicago, Ills., we have this day assigned and set
18 over to said Blanchard, Borland & Co., all our interest and claim in and to the above contract. Said Blanchard, Borland & Co. bind themselves to carry out and fulfill our part of this said contract in all its parts and to hold Watson & Oliver free and blameless from any of the covenants named in said contract.

Dated at Chicago, Dec. 26, 1872.

A. B. WATSON.
JOHN OLIVER.

And the said plaintiffs aver that in manner and form aforesaid and upon consideration of the premises aforesaid and the release of the said Watson & Oliver by the said Grey and the said assignment by the said Watson and Oliver to the said plaintiffs, the said defendant, to wit, December 26th, 1872, to wit, at Newaygo, became liable and promised to said plaintiffs to perform for and to them all the terms and agreements of and in said contracts by the said defendant to be performed to the said Watson & Oliver, and the said plaintiffs then and there promised to perform and became liable to perform their agreements in said contract to
19 for the said defendants, and the said plaintiffs in fact say that they did, to wit, at Newaygo aforesaid, to wit, June 1st, 1872, fully perform all the covenants and agreements by them to be performed by the terms of the said agreements and contracts in writing, until the abandonment thereof and refusal of said defendant to perform the same as hereinafter stated.

That until the said assignment to the said plaintiffs of the said contracts, the said Watson & Oliver, and thereafter the said plaintiffs, to wit, at Newaygo aforesaid, advanced to the said Gray upon the said contract large sums of money, to wit, on the execution of said first-named agreement the sum of two thousand dollars, to wit, on the first day of October, A. D. 1872, two thousand dollars, to wit, on the first day of Octouary, A. D. 1873, three thousand dollars, to wit, on the first day of February, A. D. 1873, two thousand, and upon the said modification of and

addition to the said first-named contract of date Nov. 20th, 1872, the said plaintiffs and the said Watson & Oliver advanced to said Grey, to wit, twenty-four hundred dollars, on the day of the execution of said contract, to wit, one thousand dollars, and, to wit, on January 15th, 1873, fourteen hundred dollars.

20 That the said plaintiffs as aforesaid advanced to said Grey, to wit, on and prior to January 1st and February 1st, 1873, on said logs a sum together with the sums previously advanced on said contract equal to two dollars per thousand feet on all the logs cut, scaled, and banked as specified in said contract, at the said date respectively.

That the said plaintiffs were always ready and willing to and did renew at ninety days' time, from time to time as the same came due, all notes given them by said Grey on account of advances upon and under said contract, so that none of said notes were required to be paid prior to May 1st, A. D. 1873.

That on the receipt of all lumber furnished them under said contract, the said plaintiffs sold the same on the Chicago lumber-market by the cargo for the best price they could obtain, and from the proceeds paid first the freights, tallying, measuring, and tow bills on said lumber; second, said plaintiffs' commissions for sales at the rate of two and one-half per centum on the gross amount of said sales; and third,

21 remitted to said Grey and his order the amount of the saw bill for sawing said lumber; and, fourth, retained the balance to apply on the payment of said advances and the notes given therefor as they became due until they are all paid, and paid the balance to said Grey and his order on demand; and the said plaintiffs aver that they were always ready and willing to receive the said lumber and sell the same as provided in and by said contract, and fully carry out and perform all the covenants and agreements contained in said contract by them or the said Watson & Oliver to be performed, and that they did so perform the same until the violation of and refusal to perform the same by the said defendant as hereinafter mentioned, to wit, at Newaygo aforesaid, to wit, during the logging season of 1873, to wit, March, April, May, June, July, August, and September, 1873.

Yet the said defendant, well knowing the premises, but wrongfully intending to injure the said plaintiffs, neglected, failed, and refused to furnish, during the season of 1872 and 1873, and cut, scale, and

22 bank from the lands mentioned in said contract, a quantity of logs not less than five million in quantity, in feet, board-measure, and as fast as the same could be done, in the spring and summer of 1873, and the fall 1872, manufacture or cause to be manufactured therefrom, at the mills mentioned in said contract, not less than five millions feet, board-measure, of lumber suitable for the Chicago market; and as fast as the same could be manufactured, ship the same to Chicago, Illinois, by lake vessels, consigned to the said plaintiffs, or to the said Watson and Oliver for sale; and also failed, neglected, and refused to ship the said plaintiffs, or the said Watson and Oliver, for sale, the additional million feet of lumber mentioned in said additional contract of date November 20th, 1872, to wit, at Newaygo, to wit, during the logging season of 1872 and 1873.

And the said plaintiffs say that, to wit, at Newaygo, aforesaid, to wit, June 1st, 1873, the said defendant entered upon the execution of said contracts, and shipped by lake vessels, to the said plaintiffs, of the lumber mentioned in said contracts, at Chicago, Illinois, a quantity of said

23 lumber, to wit, two millions one hundred and fifty-five thousand eight hundred and sixty-seven feet, and then abandoned the said

contracts and written agreements and their said agreements with said plaintiffs, and utterly neglected and refused and failed to furnish in any manner to the said plaintiffs and to said Watson and Oliver the remaining three million eight hundred and fourty-four thousand one hundred and thirty-three feet of lumber mentioned and provided for in the said memorandum and contracts of date, respectively, September 13th, 1872, and November 20th, 1872, and utterly failed and refused to furnish the same and ship the same, or any part thereof, to said plaintiffs, or to said Watson and Oliver, at Chicago, for sale, to wit, at Newaygo, to wit, July 1st, 1873.

And the said plaintiffs aver and state that by reason of the promises and the failure of the said defendant to furnish the said lumber, as aforesaid, to them to sell, they sustained large damages, to wit, two and one-half per cent. commission on the gross amount of sales thereof, to wit, five thousand dollars; and that by reason of the said failure, neglect, and refusal of the said defendant to furnish for sale, at Chicago aforesaid, the said remaining three million eight hundred and forty-four thousand one hundred and thirty-three feet of lumber to the said plaintiffs for sale, the said plaintiffs lost their commissions, profits, and gains on the sale thereof; and the said defendant became liable to pay them, and in consideration of the premises promised to pay them, forty cents per thousand feet on the said lumber, which said defendant so as aforesaid failed, neglected and refused to furnish and ship, to wit, the sum of three thousand dollars, to wit, at Newaygo, to wit, November 1st, A. D. 1873.

For that whereas, heretofore, to wit, on the thirteenth day of September, 1872, at said county, in consideration that Amasa B. Watson and John Oliver, of Chicago aforesaid, would advance, and agreed to advance, to said defendant certain sums of money, stated in a certain other agreement of September 13th, 1872, in the said words and figures as the agreement hereinbefore set forth at the time and in the manner therein stated, and would renew, and agreed to renew, the notes of said defendant, as stated in said agreement, and would receive, and agreed to receive, from said defendant, the lumber set forth in said agreement when delivered by said defendant in Chicago, Illinois, and would sell and dispose of, and agreed to sell and dispose the same, and to dispose of and account for the proceeds thereof in the manner in said agreement set forth, and promised to perform all the undertakings of themselves, said Watson and Oliver, in said agreement set forth, the said defendant then and there entered into a certain other contract in writing with said Watson & Oliver, and it was agreed by and between said parties in the same words and figures set forth in the first contract mentioned in the first count of this declaration, and for that afterwards, to wit, on the 20th day of November, 1872, at, to wit, said county, in consideration that said Watson & Oliver agreed that one million feet of pine saw-logs and lumber mentioned in a certain other contract in the same words and figures as the contract set forth in the first count hereof, of date November 20th, 1872, should be added to the amount of logs provided for in said first-mentioned contract, and the product thereof shipped and sold in the same way, and upon the same terms as specified in said first-mentioned contract, and that said Watson & Oliver should advance, and agreed to advance, to said defendant certain further sums of money mentioned in said contract next hereinafter set forth at the times and in the manner therein stated, and that the said Watson & Oliver promised to perform all their agreements in said last-mentioned contract set forth, the said defendant entered in a certain other and

further contract in writing with said Watson and Oliver, in the same words and figures as the said several contracts in the first count of this declaration mentioned as a supplemental contract.

And for that afterwards, to wit, on the 16th day of December, 1872, in consideration that said plaintiff undertook and promised said defendant to perform all the agreements of said Watson and Oliver contained in said contracts dated September 13th, 1872, and November 20th, 1872, the said defendant did make and execute the following endorsement on the back of said agreement hereinbefore set forth, and did enter into a certain contract with said plaintiffs, which endorsement and contract are in the following words and figures, to wit:

I hereby consent that the foregoing contracts may be assigned
27 to Blanchard, Borland & Co., of Chicago, Illinois, and I hereby release said Watson and Oliver from all obligations under said contracts.

Dated Newaygo, Dec. 16th, 1872.

E. L. GREY.

And for the consideration aforesaid said defendant promised, to wit, on said 16th day of December, 1872, at, to wit, said Village of Newaygo, Michigan, to wit, said plaintiffs to perform for them and for their benefit all his, said defendant's, agreements contained in said contracts dated September 13th, 1872, and November 20th, 1872, to be performed for said Watson and Oliver, and their benefit and agreed that said plaintiffs should be substituted in the place of said Watson and Oliver, and should succeed to all the rights of said Watson and Oliver in and under said contracts, and for that the said defendant at the time first aforesaid at the place first aforesaid in consideration that the said plaintiffs would perform and agree to perform the covenants of said Watson and Oliver contained in the contract first hereinbefore set forth, promised said plaintiffs to perform for them his agreements contained in
28 said first mentioned contract therein covenanted to be performed for said Watson and Oliver, and for that heretofore to wit, on the 20th day of November, 1872, at Newaygo aforesaid in consideration that the said plaintiffs agreed to perform the agreements of said Watson and Oliver contained in said second-mentioned contract of November 20th, 1872, the said defendant promised said plaintiffs to perform for them his agreements contained in said second-mentioned contract, therein covenanted to be performed for said Watson and Oliver.

And said plaintiffs aver that, to wit, on the said 16th day of December, 1872, they purchased from said Amasa B. Watson and John Oliver all their right title and interest in and to said claims under, and arising from said contracts, and the same were then and there duly assigned to said plaintiffs by said Watson and Oliver in consideration that the said plaintiffs promised to perform all of the agreements of said Watson and Oliver contained in said contracts and to save said Watson and Oliver harmless from all obligations and liabilities arising from said contracts, and paid to said Watson and Oliver the advances which they have
29 before that time paid to said defendant, to wit, the sum of $4,000, and said plaintiffs aver that said Watson and Oliver from the time of the making of said contracts, dated September 13th, 1872, and November 20th, 1872, up to the time of the assignment of the same by them to said plaintiffs, and said plaintiffs from the time of such assignment to the time of filing this declaration have in good faith fully performed all their agreements contained in all the said contracts made by

them with said defendant and have been ready and willing to perform said agreements.

And said plaintiffs further aver that said Watson & Oliver advanced and paid to said defendant on the execution of said contract first hereinbefore set forth, to wit, on the 13th day of September, 1872, to wit, the sum of two thousand dollars, on the 1st day of October, 1872, to wit, the sum of two thousand dollars, on the 20th day of November, 1872, to wit, the sum of one thousand dollars, and said plaintiffs advance and paid to said defendants on the 15th day of January, 1873, and on the 1st day of January, 1873, sums of money, which together with the sums pre-
30 viously advanced equaled two dollars per thousand feet on all logs cut, scaled, and banked, as specified in said contracts at the dates last aforesaid respectively, to wit, on said 15th day of January, 1873, the sum of, to wit, one thousand four hundred dollars, and, to wit, on said 1st day of January, 1873, the sum of, to wit, three thousand dollars, and on the first day of February, 1873, a sum of money which together with the sums previously advanced equaled two dollars per thousand feet on all logs cut, scaled, and banked, as specified in said contracts at the date last aforesaid, to wit, the sum of two thousand dollars.

And said plaintiffs further aver that the promissory notes which said defendant in accordance with said contracts made for said advances, were renewed at ninety days' time from time to time as the same came due, and that none of said notes were required to be paid prior to the 1st day of May, 1873, and said plaintiffs further aver that said Watson and Oliver, from the time of the making of said contracts to the time of the assignment of the same by them to the plaintiffs, and said plaintiffs thereafter sold all the lumber manufactured from said logs which they
31 received in accordance with the terms of said contracts, on the Chicago lumber market by the cargo for the best prices they could obtain, and that from the proceeds thereof they paid, first the freights, tallying and measuring, tow bills, &*co.*, on said lumber; second, their commissions for such sales, at the rate of two and half per centum on the gross amount of such sales; and third, they remitted to said defendant the amount of the saw bills for sawing said lumber so sold; and fourth, they retained the balance and applied the same to the payment and discharge of the notes aforesaid as they respectively became due; and any further balance of said sales they paid to said defendant on demand.

And said plaintiffs further aver that said defendant failed, neglected and refused to perform his agreements contained in said contracts, and failed, neglected and refused during the season of navigation of 1873, to manufacture and consign to said Watson and Oliver or to said plaintiffs, or to all of them combined, the amount of lumber agreed and provided in said contracts to be so manufactured and consigned, to wit, six million feet pine lumber, board measure, but manufactured and consigned
32 a much smaller amount, to wit, two million feet, and that said two million feet was the total amount manufactured and consigned to said Watson and Oliver and said plaintiffs, and that the deficiency was a large amount, to wit, four million feet of pine lumber, board measure.

And said plaintiffs further aver that said Watson and Oliver, at all times from the making of said contracts up to the assignment thereof by them to said plaintiffs, and said plaintiffs at all times thereafter up to the close of the season of navigation, of the year 1873, and for a long time thereafter, were ready and willing to receive from said defendant the full amount, to wit, six million feet pine lumber, board-measure, agreed by said defendant in said contracts to be manufactured and consigned to said Watson and Oliver up to the time of said assignment and

to said plaintiffs thereafter, and to sell and dispose of the same and apply the proceeds and account for the same in the manner provided for in said contract, and that said defendant had notice thereof.

And the said plaintiffs further aver that by the reason of the
33 aforesaid deficiency of four million feet of lumber and said defendant, said contracts and express agreements with reference to such deficiency, said defendant became indebted and liable to pay said plaintiffs at the rate of forty cents per thousand feet for such deficiency, to wit, the sum of five thousand dollars.

And being so liable, said defendant afterwards, to wit, on the 1st day September, 1874, at, to wit, Newaygo, in said county, promised said plaintiffs to pay them said sum of money on request; and plaintiffs aver that afterwards, to wit, on the day and year last aforesaid, at, to wit, the place last aforesaid, they requested said defendants to pay them said sum of money; and said plaintiffs further aver that neither said Watson and Oliver nor the said plaintiffs have retained or do retain the amount of said deficiency or any sum on account of such deficiency out of any money which have come into their hands arising from sales of said lumber. Yet the said defendant has disregarded his said promise and has not paid any of the said sum of money or any part thereof,
34 but has wholly neglected and refused so to do, to the plaintiffs' damage five thousand dollars.

And for that whereas, all heretofore, to wit, on the 13th day of September, 1872, at, to wit, Newaygo aforesaid, in consideration that Amasa B. Watson and John Oliver agreed to advance to said defendant certain sums of money provided for in a certain other agreement bearing date September 13th, 1872, hereinafter mentioned, at the times and in the manner therein stated, and agreed to renew the notes of said defendant as stated in said agreement, and agreed to receive from said defendant the lumber provided for in said agreement when delivered by said defendant in Chicago, Illinois, and agreed to sell and dispose of the same on commission, and to apply and account for the proceeds thereof in the manner set forth in said contract and in consideration of the agreement of Watson and Oliver in said contract contained, the said defendant entered into a certain other contract, in writing, with said Watson and Oliver, in the same words and figures in which the contract dated
35 September 13th, 1872, is set forth in the first count of this declaration, and which are here adopted and incorporated as part thereof as if here again set forth at length.

And for that afterwards, to wit, on the twentieth day of November, 1872, at, to wit, Newaygo aforesaid, in consideration that said Watson and Oliver agreed that one million feet of pine saw-logs and lumber mentioned in a certain other agreement bearing date November 20th, 1872, hereinafter alleged, should be added to the amount of logs provided for in said contract, dated September 13th, 1872, and the product thereof shipped and sold in the same way and upon the same terms as specified in said contract, dated September 13th, 1872; and that said Watson and Oliver agreed to advance to said defendant certain further sums of money provided in said contract, dated November 20th, 1872, next hereinafter set forth at the times and in the manner therein stated; and in consideration of the agreements of the said Watson and Oliver in said contract, dated November 20th, 1872, contained, the said
36 defendant entered into a certain other contract, in writing, with said Watson and Oliver in the same words and figures in which the contract dated November 20th, 1872, is set forth in the first count of this declaration.

And said plaintiffs further aver that said Watson and Oliver at all times from the making of said contracts dated September 13th, 1872, and November 20th, 1872, up to the assignment thereof by them to said plaintiffs, and said plaintiffs, at all times thereafter, up to the close of the season of navigation of the year 1873, and for a long time thereafter, were ready and willing to receive from said defendant the full amount, to wit, six million feet of pine lumber, board-measure, agreed by said defendant in said contracts to be manufactured and consigned to said Watson and Oliver up to the time of said assignment, and to said plaintiffs thereafter, and to sell and dispose of the sum and apply the proceeds and account for the same in the manner provided in said contracts, and the said defendant had notice thereof.

43 And the said plaintiffs further aver that by reason of the aforesaid breaches of said contracts by said defendant the plaintiffs and said Watson and Oliver lost the sale, on commission, of said lumber, to wit, four million feet, board-measure, of lumber which said defendant failed as aforesaid to manufacture and consigned to said plaintiffs or said Watson and Oliver, and the two and one-half per centum on the gross amount of the sales of said lumber in said contracts agreed to be paid to them for making such sales; and were put to great trouble and expense in preparing to receive and sell the same, and suffered damage thereby to a large amount, to wit, the sum of five thousand dollars; and the said defendant thereby then and there became indebted to the said plaintiffs in a large sum of money, to wit, the sum of five thousand dollars, and afterwards, to wit, on the 1st day of September, 1874, at, to wit, Newaygo aforesaid, promised said plaintiffs to pay them the said sum of money, to wit, at Newaygo aforesaid, whenever requested so to do.

44 And said plaintiffs aver that afterwards, to wit, on the 1st day of September, 1874, at, to wit, Newaygo aforesaid, said plaintiffs requested said defendant to pay them said sum of money; and said plaintiffs further aver that neither said Watson and Oliver nor the said plaintiffs have retained or do retain said sum or any part thereof, or the amount of the deficiency aforesaid, or any part thereof, out of the proceeds of the sales of said lumber made by them as aforesaid.

Yet the said defendant, not regarding his said promises, has not as yet paid to the said plaintiffs the said sum of money or any part thereof, but has wholly neglected and refused so to do to the plaintiffs' damage five thousand dollars.

And for that, whereas also the defendant on, to wit, the 1st day of September, A. D. 1874, at, to wit, Newaygo, in said county of Newaygo, was indebted to the plaintiffs in the further sum of five thousand dollars for the price and value of goods then and there sold and delivered by the plaintiffs to the defendant at his request.

And in a like sum for the price and value of work then and there done and materials for the same, provided by the plaintiffs to the defendant at his request.

And in a like sum for money then and there lent by the plaintiffs to the defendant at his request.

45 And in a like sum for money then and there paid by the plaintiffs to the defendant at his request.

And in a like sum for money then and received by the defendant for the use of the plaintiffs.

And a like sum for money then and there found to be due from the defendant to the plaintiffs on an account stated between them.

And thereupon the said defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively, then and there

promised the plaintiffs to pay them the said several sums of money respectively on request.

Yet the said defendant his disregarded his said promise and has not, although often requested so to do, paid any of the said sums of money or any part thereof, to the plaintiffs' damage of five thousand dollars, and therefore they bring suit, etc.

HUGHES, O'BRIEN & SMILEY,
Plaintiffs' Attorneys.

46 STATE OF MICHIGAN,
County of Newaygo, ss:

I hereby certify and return that on the 25th day of August, A. D. 1876, I served the declaration, of which the within is a copy, on Edgar L. Grey, the defendant named in said declaration, by delivery to said defendant, in the said county of Newaygo, a true copy thereof and of the foregoing rule and the notice relating thereto, together with a true copy of the notice to appear and please endorse thereon as hereon endorsed. Fees 1,10.

STEPHEN D. THOMPSON,
Under Sheriff.

47 STATE OF MICHIGAN:

The circuit court for the county of Newaygo.

WILLIAM BLANCHARD, JOHN J. BORLAND, & Horatio G. Billings, pl'ffs,
vs.
EDGAR L. GREY, DEF'T.

On filing declaration as commencement of suit in the above-entitled cause, pursuant to and in accordance with the statute made and provided and the rules and practice of this court, and on motion of Hughe', O'Brien & Smiley, esq's, attorneys for the plaintiffs, it is ordered that the said defendant herein appear and plead to the said declaration, within twenty days after service upon him of a copy thereof, and notice of this rule or judgment, &co.

Dated August 25th, 1876.

HUGHES O'BRIEN & SMILEY,
Plaintiffs' Att'ys.

48 STATE OF MICHIGAN:

The circuit court for the county of Newaygo.

EDGAR L. GREY
ads.
WILLIAM BLANCHARD, JOHN J. BORLAND, and Horatio G. Billings.

And the said Edgar L. Grey, defendant in this suit, by Grey and Luton, his attorneys, comes and defends the wrong and injury when, &c. And says that the special counts of the said declaration and the matter therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same.

And this he is ready to verify; therefore for want of sufficient special counts of the said declaration in this behalf the said defendant prays judgment and that the said plaintiffs may be barred from having or maintaining their aforesaid action against him, &c.

GREY AND LUTON,
Def't's Att'ys.

(Indorsed:) State of Michigan. The circuit court for county of Newaygo. Edgar L. Grey ads. William Blanchard et al. Demurred and filed Sept. 14th, 1876. Sanford Brown, clerk. Grey and Luton, def't's att'ys.

49 STATE OF MICHIGAN.

The circuit court for the county of Newaygo.

WILLIAM BLANCHARD, JOHN J. BORLAND, and Horatio G. Billings.
vs.
EDGAR L. GREY.

GENTS: Please to take notice that the plaintiffs are required to furnish to the attorneys of the defendant an account, in writing, of the particulars of their demand that they seek a recovery for under the common counts of their declaration filed in this cause.

Dated Sept. 14th, 1876.

Yours, &c.,

GREY AND LUTON.
Def't's Att'y.

To Messrs. HUGHES, O'BRIEN, and SMILEY,
Pl'ff's' Att'ys.

(Endorsed:) State of Michigan. The circuit court for the county of Newaygo. William Blanchard et al. vs. Edgar L. Grey. Bill of particulars. Received and filed Sept. 14th, 1876. Sanford Brown, clerk. Grey & Luton, def't's att'ys.

50 STATE OF MICHIGAN:

The circuit court for the county of Newaygo.

WILLIAM BLANCHARD, JOHN J. BORLAND, and Horatio G. Billings,
vs.
EDGAR L. GREY.

The petition of William Blanchard, John J. Borland, and Horatio G. Billings, respectfully shows unto this court that they are citizens of Chicago in the State of Illinois.

That a suit of a civil nature at law has been commenced by your petitioners in this court, and is now pending against the said Edgar L. Grey. That the said Edgar L. Grey is a citizen of the State of Michigan.

That such suit was commenced by a declaration filed with the clerk of said court on or about the 25th day of August, 1876, a copy of which said declaration was served on the said Edgar L. Grey on or about the said 25th day of August, 1876.

That the matter in dispute in said suit exceeds, exclusive of costs, the sum and value of five hundred dollars and is of the value of two thousand dollars.

51 That in the said suit there is a controversy between citizens of different States, to wit, between your who were at the time of begin'ing said suit and have ever since been and now are citizens of the State of Illinois, and the said Edgar L. Grey, who was at the time of the commencement of said suit and has ever since been and now is a citizen of the State of Michigan and of the western district thereof. That the said suit is still undetermined and that this petition is now filed at the term at which said cause could first be tried and before the trial thereof, for the removal of such suit into the circuit court of the United States for the western district of Michigan where such suit is pending. Petitioners have made and filed herewith a bond, with good and sufficient suriety for their entering in such United States circuit court, on the first day of its now next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said United States circuit court, of said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appear-

52 ing and entering special bail, if special bail was originally requisite therein according to law and the practice of the United States courts.

Your petitioners therefore claim the removal of such suit into the said circuit court of the United States for the western district of Michigan, persuant to the provisions of the statute of the United States entifled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3rd, 1875, and that the said State court should accept this said petition and bond and proceed no further in such suit, and any bail that may have been originally taken should be and is hereby discharged.

53 HUGHES, O'BRIEN & SMILEY,
Attorneys for Petitioners,
Wm. Blanchard, John J. Borland, H. G. Billings.

STATE OF ILLINOIS,
County of Cook:

On this 14th day of September, 1876, before me, a commissioner for Michigan in the State of Illinois, personally appeared William Blanchard, John J. Borland, and Horatio G. Billings, to me known to be the person' who subscribed the foregoing petition, who being each by me duly sworn, on their oathes say, that they have heard read the foregoing petition by them subscribed, and know the contents thereof; that the same is true of their own knowledge except as to the matters therein stated upon information and belief, and as to those matters they believe it to be true.

PHILIP A. HOYNE,
Commissioner for Michigan in the State of Illinois.

54 Know all men by these presents, that we, William Blanchard, John J. Borland, and Horatio G. Billings, of Chicago, in the State of Illinois, as principals, and Mitchell J. Smiley, of Grand Rapids, Michigan, as suriety, are held and firmly bound unto Edgar L. Grey, of Newaygo, in the county of Newaygo, and State of Michigan, in the sum of one thousand dollars, for which payment, well and truly to be

made, we bind ourselves and our legal representatives firmly by these presents. Sealed with our seal, dated this 14th day of September, 1876.

Whereas the above-named William Blanchard, John J. Borland, and Horatio G. Billings have commenced a suit in the circuit court for the county of Newaygo, against Edgar L. Grey;

And whereas the said William Blanchard, John J. Borland, and Horatio G. Billings desire to have the said suit removed for trial into the circuit of the United States for the western district of Michigan:

Now, therefor', the condition of this obligation is such, that if the said William Blanchard, John J. Borland, and Horatio G. Billings shall
55 enter in such United States circuit court, on the first day of its then next session, a copy of the record in such suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that suit was wrongfully or improperly removed thereto, and shall also then appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation to be void, otherwise to remain in full force and effect.

W'M BLANCHARD. [L. S.]
JOHN J. BORLAND. [L. S.]
H. G. BILLINGS. [L. S.]
M. J. SMILEY. [L. S.]

56 STATE OF MICHIGAN,
County of Kent:

Mitchell J. Smiley, surety in the foregoing obligation, being duly sworn, deposes and says that he is a resident of the State of Michigan, and a householder therein, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from execution.

M. J. SMILEY.

Subscribed sworn before me this 16th day of September, A. D. 1876.

N. A. EARLE,
Notary Public, Kent County, Michigan.

(Indorsed:) Newaygo circuit. William Blanchard et al. vs. Edgar L. Grey. Pe'tion and bond for removal to U. S. court. Filed Sept. 16th, 1876. Sanford Brown, clerk. Hughes, O'Brien & Smiley, pl'ffs' att'ys.

57 STATE OF MICHIGAN:

The circuit court for the county of Newaygo.

WILLIAM BLANCHARD, JOHN J. BORLAND, & Horatio G. Billings, pl'ffs,
vs.
EDGAR L. GREY, DEF'T.

NEWAGO COUNTY, *ss:*

I, Sanford Brown, clerk of said county and court, do hereby certify that I have examined and compared the above and foregoing with the original declaration, demurrer, and other papers filed in this cause, and of the rules entered therein; that the same is the whole of said cause remaining of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said county this 29th day of September, A. D. 1876.

SANFORD BROWN,
County Clerk.

58 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan.

WILLIAM BLANCHARD, JOHN J. BORLAND, and Horatio G. Billings,
vs.
EDGAR L. GRAY.

And the said plaintiffs, by Hughes, O'Brien & Smily, their attorneys, say that the said declaration is sufficient in law.

HUGHES, O'BRIEN & SMILY,
Attorneys for Pl'ffs.

(Indorsed:) U. S. court, west. dist. of Mich. William Blanchard et al. vs. Edgar L. Gray. Joinder in demurrer. Filed Nov. 25, '76. Chester B. Hinsdill, clerk. Hughes, O'Brien & Smily, att'ys for plaintiffs.

59 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 20 day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first:

Present the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

WILLIAM BLANCHARD, JOHN J. BORLAND, and Horatio G. Billings
vs.
EDGAR L. GRAY.

This cause came on to be heard upon demurrer, and was overruled with costs, including an attorney fee of ten dollars.

On motion of Hughes, O'Brien & Smiley, ordered that the defendant have thirty days in which to plead.

60 UNITED STATES OF AMERICA:

The circuit court for the United States for the western district of Michigan.

EDGAR L. GRAY
ads.
WILLIAM BLANCHARD, JOHN J. BORLAND, & Horatio G. Billings.

The defendant, Edgar L. Gray, by Gray & Luton, his attorneys, comes and demands a trial of the matters set forth in the plaintiffs' declaration.

GRAY & LUTON,
Attorneys for Defendant.

Please to take notice that the said defendant will on the trial of this cause insist upon and give in evidence under the general issue above

pleaded that before and at the time of the commencement of this suit the said plaintiffs were and still are indebted to the said defendant in the sum of ten thousand dollars, for the price and value of goods before then sold and delivered by the defendant to the plaintiffs at their request; and in a like sum for the price and value of work then done and materials for the same provided by the defendant for the plaintiffs at their request; and in a like sum for the price and value of work then done by the defendant for the plaintiffs at their request; and in a like sum for the money then lent by the defendant to the plaintiffs at their request; and in a like sum for money then paid by the defendant for plaintiffs at their request; and in a like sum for money then received by the plaintiffs for the use of the defendant; and in a like sum for money then found to be due from the plaintiffs to the defendant on an account stated between them; and in a like sum for the use of money then due from the plaintiffs to the defendant, and by the defendant foreborne to the plaintiffs at their request; which said several sums of money, or so much thereof as will be sufficient for that purpose, the said defendant will set off and allow to the plaintiffs against any demand or demands of said plaintiff, to be proved by them on said trial, and have the balance certified in his favor.

Dated the 18 day of January, 1877.

Yours, &c.,

GRAY & LUTON,
Attorneys for Defendant.

To Messrs. HUGHES, O'BRIEN & SMILEY,
Attorneys for Plaintiffs.

(Indorsed:) The circuit court of the United States in the western district of Michigan. Edgar L. Gray ads. William Blanchard et al. Plea non-assumpsit and notice of set-off. Filed January 20, '77. Chester B. Hinsdill, clerk. Gray & Luton, att'ys for def't. To clerk of court to file.

61 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 19th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first:

Present the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

WILLIAM BLANCHARD, JOHN J. BORLAND, AND Horatio G. Billings
vs.
EDGAR L. GRAY.

The jury heretofore empanneled in this cause sat together in the jury box and heard the evidence this day adduced, and after listening to the arguments of counsel and the charge of the court, retired in charge of an officer of the court duly sworn to attend them, and after being absent for a time return into court and say upon their oaths that the said defendant did undertake and promise in manner and form as the plaintiffs have in their declaration alleged, and assess the damages of the plaintiffs at the sum of eleven hundred eighteen & $\frac{71}{100}$ dollars ($1,118.71) over and above their costs and charges.

It is therefore considered by the court that the said plaintiffs do recover against the said defendant the said sum so assessed as aforesaid, together with their costs and charges to be taxed, and that they have execution therefor.

62

Ordered, that defendant have sixty days in which to settle bill of exceptions, with stay of proceedings in the mean time except as to taxation of costs.

63 UNITED STATES OF AMERICA:

In the district court for the western district of Michigan.

WILLIAM BLANCHARD, JOHN J. BORTLAND & Horatio G. Billings
vs.
EDGAR L. GRAY.

Charge to the jury in the above-entitled case, as delivered by his honor Solomon L. Withey, district judge, at Grand Rapids, Michigan, Tuesday, June 19th, 1877.

GENTLEMEN OF THE JURY: This case has occupied a much longer time in the trial and submission than the importance demands.

The questions involved, however, inclu' a somewhat important contract between these parties, have raised, in the course of the trial, a number of interesting questions, if not difficult, at least some of them not usual, and I suppose that we must attribute the length of this trial to those peculiar questions which have arisen in the case.

However, when we get through with the testimony we find that the case lies in a small compass; there are really but few questions involved, and, as we regard it, those questions are not involved in difficulty or doubt, so far as the law of the case is concerned, and we apprehend that the jury will take about the same view as to the facts; there is nothing so difficult in determining questions of fact, under the rules which the court will lay down, but that you will readily reach a result.

64

The contract introduced in evidence, having been assigned to the plaintiffs by Watson & Oliver, and by the consent of the defendant, in December, 1872, the plaintiffs occupy the place, and are entitled to the rights of Watson & Oliver under the contract.

The plaintiffs in this case claim to have carried out the contract on their part, and that the defendant has failed to comply on his part in not delivering all the lumber required by the terms the agreement.

Evidence has been introduced tending to prove the claim of the plaintiffs, and it appears that the defendant delivered less than half of the six millions of feet agreed by him to be delivered under the contract.

Should you find from the evidence that the plaintiffs performed on their part, and that the defendant failed to perform on his part, the agreement of the contract, then the plaintiffs are entitled to recover whatever damage they have suffered in consequence of the failure on the part of the defendant.

On the contrary, if the defendants failed to perform his agreement to deliver six million feet of lumber because of a breach of the contract by plaintiffs in not selling defendant's lumber on as favorable terms as they were bound to do under the contract, then the defendant would be excused from further performance, and the plaintiffs could not recover.

65

The proof by the plaintiffs that they sold the defendant's lumber for the prices mentioned in the testimony, and that it was the market price, casts the burden of proof on the defendant, to show that the price was not the market price of that lumber in the Chicago market.

In arriving at a concluson upon this question, whether the plaintiffs failed to sell defendant's lumber at the market price, the jury will be governed by the preponderance of evidence, precisely as upon any other question of fact in the case.

In order to defeat the plaintiffs' right to recover on the ground that they sold the defendant's lumber below the market price, you must be satisfied that the sales made by the plaintiffs were materially below the market price in Chicago, the price which ought to have been realized and could have been by reasonable efforts on the part of the plaintiffs.

In this connection, we instruct the jury that the plaintiffs were not bound to sell defendant's lumber on credit. If they sold for the market price in cash, they did all they were bound to do under the contract. The question is not whether some other lumber dealer or commission merchant got more for lumber in Chicago that season, or could have got more for defendant's lumber than plaintiffs did, but whether the plaintiff' sacrificed the defendant's lumber or his interests by selling materially below the market price of lumber; if so, the defendant would have
66 a right to protect himself by a refusal to continue the delivery of lumber. In other words, he would not be bound to stand by and see his property sacrificed and be left only to his remedy by action for damages. If the plaintiffs are entitled to recover, then an important question is as to the measure of damages.

The plaintiffs ask that they may recover forty cents per thousand feet for the amount of lumber which the defendant failed to deliver. We think, as plaintiffs have tried their case upon the theory and claim that stipulated damages do not controle the rights of the parties, notwithstanding an agreement to that effect, that the case ought to be submitted to the jury and determined without reference to the agreement as to the measure of damages under the contract. If the amount in controversy was sufficient in this case to entitle the parties to a review in the Supreme Court of the United States, we should, perhaps, instruct you in a way more fully to reflect our views on the rule of law governing this case. The decisions on this questions of stipulated damages are somewhat in conflict, and we have not the time to examine and now enter upon a discussion of the question.

We instruct you, therefor', that the damages in this case, if the plaintiff is entitled to recover, would be the gain which the plaintiffs would have made in selling the lumber, not delivered, had it been furnished by the defendant. The gain which plaintiffs would have made in selling the lumber of defendants not delivered, this gain is the difference between the contract price for selling and the cost of selling.
67 It was this difference which induced the plaintiffs to enter into the contract or to assume the agreement of Watson & Oliver, and constitutes the gain or profit of which plaintiffs were deprived by the defendant's failure to carry out the contract.

If plaintiffs and those engaged in the same business had to make contracts in the fall and winter, and arrange their expence account for the season by employing men and otherwise for the next season's business, and could have sold the lumber that the defendant failed to deliver under this contract without any extra cost or expence over the cost and expence of selling the lumber which they did sell, then the damages would be 2½ per cent. commission that the plaintiffs were to receive on the market price

of the lumber. In other words, if the plaintiffs could have sold the lumber which defendant failed to deliver without any extra or further cost than they were to in selling what lumber they did sell that season in their commission business, then the pl'ff' would be entitled to the full 2½ per cent. commission on the lumber not delivered precisely as though they had sold it.

The plaintiffs have shown that the average price for which they sold the lumber of the defendant was $11.75 per thousand feet. Whether that is the average price, the jury will determine. But if you find that to have been the average market-price for which the balance of the defendant's lumber, not delivered, would have been sold if it had been delivered, and prima facie it would be, then you have the basis for computing the damages for the portion not delivered, under the rules already given you.

68 Thus, if $11.75 per thousand feet was the amount, take the quantity not delivered, multiply it by this average price, and you have the total sum which would have been received, and the difference between the contract price for selling and the cost of selling it would, multiplied by the sum given, give you the amount in damages.

If $11.75 per thousand feet was not the average market-value of the lumber, then you will ascertain what it was, and then you will have a basis.

If it would have cost a quarter of the 2½ per cent. commission, which plaintiffs were, by the contract, to receive, or any other per cent. or portion of the contract price for selling, you will take such facts into consideration in reaching the damages.

If it would have cost plaintiffs but $100 or other sum, whatever it may be, to sell the lumber not delivered by defendant, you will be able, in like manner, to ascertain the difference between the contract price and the cost of selling.

The defendant failed to deliver 3,844,133 feet of lumber contracted by him to be delivered, according to the testimony, and about which, I believe, there is no dispute. Ascertain the average market-value at which it would have sold if it had been delivered and then the sum which such lumber would have produced and this sum, multiplied by the difference between the contract-price for selling and the cost of selling, gives the damages sustained by the plaintiffs.

Now as to the question of usury. We discover nothing in the

69 contract which indicates a usurious agreement, and there are no proofs tending to show that the agreement by defendant to pay 2½ per cent. commission was a devise to cover a usurious promise. On the contrary, the value of the services for selling the lumber on commission at Chicago seems to be clearly established to have been worth 2½ per cent. Hence, we instruct you that the contract was not usurious. We prefer to take the entire responsibility of that question, that the jury may have no difficulty with it.

As to the claim by defendant of $223 and some cents, we instruct you that if plaintiffs acted upon the instructions received as to the proceeds of the sale of the cargo shipped by Dickenson & Williams as they understood those instructions to be, and acting upon those instructions transmitted an account of the sales of that cargo to the defendant, stating what they had done, and if defendant neglected for a year or for any unreasonable time to inform plaintiffs of the error which he made claim to have existed, and the plaintiffs were induced on account of defendant's silence to believe that they had acted as they were requested to do, and settled with and paid all the parties interested in the cargo the proceeds, the defendant is estopped from setting up any claim in reference to this

particular item. In other words, whatever the instructions may have been, if those instructions were acted upon by the plaintiff and the defendant informed of that action and he did not notify the plaintiffs of any error which he claimed to exist, or which in fact did exist, and
70 by reason of his silence plaintiffs were induced to settle with other parties who had a claim upon the proceeds of that cargo, so that when this matter, a long time subsequent, came to the knowledge of the plaintiffs as to the claim of the defendant it was out of their power to rectify the matter with the defendant, then the defendant is estopped from setting up any such claim. He should have it made it seasonably. The only question is, whether he made this representation and notified the plaintiffs seasonably in reference to this claim, and while it was within their power to have corrected it and have made the defendant whole.

We have been requested by the defendant's counsel to give certain instructions in reference to the question of failure on the part of the plaintiffs to perform. We think we have already given you all the instructions that are necessary, but will repeat somewhat categorically in reference to the questions which were propounded by the defendant's counsel and it will apply to the request.

We say that the plaintiffs cannot recover if they failed to perform the contract without fault on the part of the defendant, and their failure was the cause of the defendant's failure to perform by non-performance; that is to say, if plaintiffs failed to perform this contract without fault on the part of the defendant—that is, they did not sell his lumber as they were bound to under the contract, and it was not caused by the defendant's failure to perform, then, of course, they cannot recover.

71 As we understand the other form of the request, it was, that if the plaintiffs abandoned the contract, that would justify the defendant in not performing. In other words,

As to the other branch of the request, we think we have covered it all by what we have said in reference to the question whatever the plaintiff failed to sell the defendant's lumber at the market price. They were bound to sell it at the market price, and if they did not do so, there was a material injury in consequence of such want or failure to sell at the market price. The defendant would be justified in considering that, and refusing to deliver more lumber. But we think, in connection with that, that the jury will consider, or should consider, that during all the season, from some time in June until November, the defendant was continually shipping lumber to these plaintiffs and was, from time to time, as each cargo was sold from week to week, or month to month, as the case was, advised as to the price which the cargo brought.

I had thought at one time to comment somewhat upon the evidence in the case lest there might be some difficulty with the jury in reaching conclusions, but, upon reflection, and in view of the full argument which the case has had by the learned counsel, we think that there is no occasion for the court holding up before you the different views of the testimony, which might be done, and of balancing it, by comparison, in reference to its weight upon the different topics which have been introduced in evidence.

72 As I look at the case, it has become a very simple one, and is without any difficulty whatever.

The court and the jury, in looking at the evidence in the case, the court in ruling and the jury in reaching conclusions, are to try this case precisely as if we were absolute strangers to both of these parties, and we have but one duty, and that is to reach the right result, and if we

reach that we have discharged and performed the functions which are devolved upon us; and beyond that, we have no considerations with reference to the matter, one way or the other. If I am understood, then, in reference to the questions which have been presented, the case may be submitted to you for your verdict.

73 UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

EDGAR L. GRAY, PLAINTIFF IN ERROR, *ads.*
WILLIAM BLANCHARD, JOHN J. BORLAND and Horatio G. Billings, defendants in error.

WESTERN DISTRICT OF MICHIGAN, *ss:*

Be it remembered that in the year of our Lord one thousand eight hundred and seventy-six, on the 25th day of August of that year, the said William Blanchard, John J. Borland, and Horatio G. Billings, by Hughs, O'Brien & Smiley, their attorneys, commenced a suit of a civil nature, at law, in the circuit court for the county of Newaygo, said court being in the county of Newaygo and western district of Michigan, and being a court organized and existing under a statute of the State of Michigan, having jurisdiction to try the said suit at law so as aforesaid begun by said plaintiffs against said defendant, Edgar L. Gray.

74 That such suit was commenced by declaration, filed with the clerk of said circuit court for the county of Newaygo, and the said cause was duly removed to the said circuit court of the United States for the western district of Michigan.

And the said Edgar L. Gray, by his attorneys, Gray and Luton, filed and served, in accordance with the rules and practice of the said circuit court of the United States, his plea of non-assum'sit with a notice of set-off to plaintiffs' demand.

That by said notice of set-off, the said Edgar L. Gray claimed the right to set off against said William Blanchard, John J. Borland, and Horatio G. Billings' claim against him, the sum of ten thousand dollars, and to recover against the said William Blanchard, John J. Borland, and Horatio G. Billings a judgment for the excess of the said claim of set-off over the amount claimed in said declaration by said plaintiffs against said Edgar L. Gray.

That by the laws of the State of Michigan, such a defence is permitted, and if the defendant succeeds in proving his set-off, and it is larger than the plaintiffs' claim, he is entitled to a judgment for the excess. That the parties are concluded by the judgment, and cannot again litigate the same subject-matter, unless the judgment should be reversed. This law of set off, and the practice under it, has been adopted,

75 and is the rule and the law of the circuit court of the United States for the western district of Michigan.

That afterwards, on the 14th day of June, and in the term of May of said circuit court of the United States for the sixth circuit and western district of Michigan, in the year of our Lord one thousand eight hundred and seventy-seven, at the city of Grand Rapids, in the said western district, before the honorable Solomon L. Withey, United States district judge for the western district of Michigan, presiding over the circuit

court of the United States for the sixth circuit and western district of Michigan, came as well the within-named William Blanchard, John J. Borland, and Horatio G. Billings, plaintiffs, as the within-named Edgar L. Gray, defendant, by their respective attorneys within mentioned, and the jurors of the jury, whereof mention is made, being summoned, also came, and being chosen, tried, and sworn to say the truth of the matters within contained, the said William Blanchard, John J. Borland, and Horatio G. Billings, to prove and maintain the issue joined on their part, produced divers witnesses who were duly sworn in that behalf, and who gave evidence in said cause before said jury in said court tending to prove that on the 13th day of September, 1872, at Newaygo, in the State of Michigan, the said Edgar L. Gray entered into a contract in writing with Amasa B. Watson and John Olliver, of the city of
76 Chicago, State of Illinois, upon good and sufficient consideration, and that the said contract was in the words and figures following, that is to say:

This memorandum of agreement made this 13th day of September, A. D. 1872, by and between Edgar L. Gray, of Newaygo, in Newaygo County, Michigan, and Amasa B. Watson and John Olliver, of Chicago, Illinois, witnesseth:

That whereas the said Edgar L. Gray is about to cut off and prepare for sawing a quantity of pine saw logs from certain lands laying upon or adjacent to the Marquette River or its tributaries in the State of Michigan, said logs to be properly scaled and banked, and delivered during the sawing season of 1873 at the mill of Jno. Bean, or some other suitable saw-mill located at Ludington or Pere Marquette River, in the State of Michigan, and at such mill to be manufactured into lumber suitable for sale in the Chicago market; and whereas said Gray is desirous that said Watson and Oliver shall make advances upon said logs to be repaid out of the proceeds of the lumber manufactured therefrom or according to the tenor of certain promissory notes hereinafter described:

Now, it is agreed that said Gray during the season of 1872–3 shall cut, scale, and bank from the lands aforesaid a quantity not less than five million (5) feet board-measure of pine saw logs, and that as fast as the same can be done in the spring and summer of 1873, or fall of
77 1872, cause to be manufactured therefrom at the mill or mills aforesaid not less than five millions feet board-measure of lumber, suitable for the Chicago market, and as fast as the same shall be manufactured, ship the same to Chicago, Ill's, by lake vessels consigned to said Watson & Oliver for sale.

The said Watson & Oliver, in consideration of the promises, agree to advance to said Gray the following sums of money to wit: On the execution of this agreement, the sum of two thousand dollars ($2,000); on the first day of Oct., A. D. 1872, the sum of two thousand dollars ($2,000); on the first day of January, A. D. 1873, the sum of three thousand doll's ($3,000); and on the first day of February, A. D. 1873, the sum of $2,000 (two thousand doll's): Provided further, That the advance above specified to be paid on the first days of January and February, A. D. 1873, together with the sums previously advanced, shall not exceed in amount at the rate of two doll's (2) per thousand feet on all logs cut, scaled, and banked as specified in this contract at the dates above specified for said payments to be made, for which several amounts so advanced said Gray is to execute his promissory notes due 90 days after date respectfully, and out of the same to allow and pay discount at the rate of ten per cent. per annum, of which said notes those coming due prior to May 1st, 1873, said Watson & Oliver agree shall be renewed at ninety days' time, from

time to time, as the same shall come due, so that none of them
78 shall require to be paid prior to May 1st, 1873, said Gray paying expences of renewal and discount at the rate of ten per cent. per annum at the time of each renewal.

The said Watson & Oliver, on receipt of the lumber manufactured from said logs, are to sell the same on the Chicago lumber market by the cargo for the best price they can obtain, and from the proceeds to pay, first, the freights, tallying and measuring, tow bills, &c., on said lumber; second, their commissions for sales at the rate of 2 & one-half per centum on the gross amount of the sales; third, to remit to said Gray or his order the amount of the saw bill for sawing said lumber so sold; and fourth, the balance to be retained by said Watson & Oliver to be applied on the payment and discharge of the notes aforesaid as they respect*fully* become due until all shall be paid; any further balance of said sales to be paid to said Gray or order on demand.

It is further agreed that in case said Gray shall fail to manufacture & consign to said Watson & Oliver the amount of lumber hereinbefore named during the season of navigation of 1873, that then, for any deficiency in such amount, he shall pay to said Watson & Oliver at the rate of forty cents (40) per thousand feet, which sum they may retain out of any moneys in their hands arising from sales, and for which said Gray shall be liable in addition to said notes if any remain unpaid. It
79 is further agreed that all logs put in by said Gray under this agreement shall be plainly marked in the usual manner of marking logs with some one of the marks following, to wit: ℄, ⊕, ℄, ©, A, which said marks shall be duly recorded in the proper office of the locality where said logs are cut. It is further agreed that in case any of the logs so put in by said Gray under this agreement shall be owned by him jointly with others, then the amount to be advanced on said logs shall be estimated only upon said Gray's actual interest in the same.

It is further agreed that the said Watson & Oliver, as security for the payment of the advances made by them under this agreement and the notes given therefor, shall have and be entitled to assert and claim a lien upon any and all logs cut, scaled, and marked by said Gray under this agreement and the lumber manufactured therefrom, which lien they may enforce and maintain in any and all lawful ways until said advances and the notes given therefor shall be paid; and it is further agreed that said Gray shall make and execute to said Watson & Oliver, when so requested by them, a chat'el mortgage on any or all logs put in under this agreement for a sum sufficient to cover any advances made thereon.

In witness whereof the said parties have hereunto set their hands the day and year first aforesaid.

EDGAR L. GRAY.

80 Which said contract in writing was not signed by said Watson & Oliver, but only by the said Edgar L. Gray, but John Oliver testified he sent by mail to said defendant duplicate copies of said contract, one of which was signed by Watson & Oliver, which was for Gray to keep, and the other to be signed by Gray, and to return to Watson & Oliver, and Gray kept the one signed by Watson & Oliver, and returned the other signed by Gray, which was never signed by Watson & Oliver, except by putting their name to said supplemental contract, and the plaintiffs duly gave defendant notice to produce his said duplicate of said contract on the trial, but defendant, on the trial, declined to produce it, claiming he did not have one, and also that said Watson & Oliver sent said Edgar L. Gray certain drafts for five thousand dollars,

and received for the same Edgar L. Gray's promissory note, due in six months from the time said drafts were received; that said drafts were sent and said note received in reliance upon the aforesaid contract; and also that afterwards, to wit, on the 20th day of November, 1872, at Newengo, said Edgar L. Gray, for good and sufficient consideration, entered into another contract in writing with the said Watson & Oliver, as the sup'liment and addition to the said contract hereinbefore mentioned, of date September 13th, 1872, which additional and sup-
81 'lementary contract was annexed to and written on the back of the same sheet as the other, the said first-mentioned contract, and was in the words and figures following, to wit:

Memorandum made this 20th day of November, A. D. 1872, witnesseth:

That whereas the within-named Edgar L. Gray has now on hand one million feet of pine saw-logs and lumber at Ludington, Mich., not cut under the within contract, it is hereby agreed that the said one million feet of logs and lumber shall be added to the amount of logs provided for in the within contract, and the product thereof shipped and sold in the same way and upon the same terms as specified within; and it is further agreed that said Watson & Oliver shall advance to said Gray the sum of twenty-four hundred dollars ($2,400), as follows, to wit: One thousand dollars this day, and fourteen hundred dollars on the 18th day of January, A. D. 1873, to be secured and repaid in the same manner as the advances provided in the within contract. Said logs are marked for identification in the same manner as the logs provided for in the within contract, and the provision in said contract for a lien upon the logs shall also apply to the logs and lumber herein named.

Witness our hands the day and year first above written.

E. L. GRAY.
A. B. WATSON.
JOHN OLIVER.

82 Which said additional and sup'lementary contract was signed by the said Watson & Oliver, and by the said Gray, and that on the 16th day of December 1872, the said Edgar L. Gray endorsed upon the said contract, at the request of said Watson & Oliver, the following, to wit:

I hereby consent that the foregoing contracts may be assigned by Watson & Oliver to Blanchard, Borland and Co., of Chicago, Ill's, and I hereby release said Watson & Oliver from all obligation under said contract.

Dated Newaygo, December 16th, 1872.

E. L. GRAY.

And that afterwards, to wit, on December 26th, 1872, in consideration of the premises, the said Watson & Oliver did assign all their claim and interest in and to the foregoing contract of September 13th, 1872, with the modification and sup'lements as aforesaid, to the said Blanchard, Borland and Co., which said assignment was in writing and signed by the said Watson & Oliver, and is in the words and figures following, to wit:

In consideration of one dollar in hand paid by Mess'rs Blanchard, Borland & Co., of Chicago, Ill's, we have this day assigned and set over

to said Blanchard, Borland & Co. all our interest and claim in and to the above contract. Said Blanchard, Borland & Co. binds themselves to carry out and fulfill our part of this contract in all its parts, and
83 | to hold Watson & Oliver free and blameless from any of the covenants named in said contract.

Dated Chicago, December 26th, 1872.

A. B. WATSON.
JOHN OLIVER.

And plaintiffs at the same time repaid Watson & Oliver the five thousand dollars and interest, and Watson & Oliver delivered to plaintiffs the five thousand dollar note of Gray.

Also, that the said William Blanchard, John J. Borland, and Horatio G. Billings were copartners under the firm-name of Blanchard, Borland & Co., doing business in the city of Chicago, State of Illinois, as lumber commission merchants. That the said Edgar L. Gray was a dealer and manufacturer in lumber, and owner of pine lands in the State of Michigan, and that the said Blanchard, Borland & Co. advanced moneys to said Edgar L. Gray, as specified in said written contracts, and that they sold the lumber that was shipped to them during the season of 1873, by said Edgar L. Gray, and in accordance with the terms of said written contracts, and that said Edgar L. Gray failed to deliver to said Blanchard, Borland & Co. three million eight hundred and forty-four thousand one hundred and thirty-three feet of lumber, of the lumber mentioned in said contract, but did not deliver this balance, board measure, during the season of 1873, and that they sold it at the highest price that they could obtain for it on the Chicago market, and that their evidence tended to show that they could have sold eighty million feet, board measure, of lumber during the season of 1873, and that it would not have
84 cost them, with their clerks all hired for the year, and their force for that purpose engaged, over one hundred dollars additional expense to have sold the amount of shortage of lumber hereinbefore specified, and some of plaintiff's witnesses testified that it would cost nothing more, perhaps a trifle for postage; and that they made the arrangement for the hiring of their clerks and the renting of their offices in the fall of 1872.

That contracts for the sale of lumber are generally made in the fall and winter of the year, previous to the opening of navigation; and that said Edgar L. Gray shipped, during the season of navigation of 1873, to the said Blanchard, Borland & Co., over two million feet of lumber, under said contract, and that they sold the same for the highest market price that they could obtain therefor, and that they retained out of the proceeds of the sales two and one-half per cent., and paid M. L. Sweet his saw bill as specified in said written contracts, and applied the balance upon the indebtedness of said Edgar L. Gray to said Blanchard, Borland & Co. That aside from the commissions claimed by plaintiffs for lumber not delivered, the accounts between the parties were nearly balanced and were not one hundred dollars apart.

And thereupon the counsel for Blanchard, Borland & Co. rested their case.

And thereupon the defendant, Edgar L. Gray, to maintain the
85 issue on his side now in this case, produced several witnesses, who were sworn in said cause, and gave evidance before said court and said jury, which evidance so given in said cause before said jury tended to prove that said Edgar L. Gray resided in Newaygo, Michigan, and during a portion of the fall was sick with typhoid fever at Newaygo;

that he did not know much about the market price of lumber in Chicago in 1873; that he received from Blanchard, Borland & Co. accounts of the sales of lumber made immediately after each sale by cargo, which amount stated the prices which the lumber sold for; that there was no evidance tending to show any oral agreement made between the plaintiffs and defendant that the said plaintiffs would perform the agreement of said Watson & Oliver, as alleged in said declaration; nor was there any evidance of any other written contracts than those introduced in evidance, copies of which are set forth in this bill of exceptions, and it appeared that said Oliver was not a commission merchant at the date of said contracts, and Watson & Oliver had at the time no other contracts for the sale of lumber on commission, nor obtained any subsequently.

Watson was a commission merchant, and had been selling from twenty-five to thirty millions feet of lumber per annum on commission in Chicago, and when he made said contracts expected to continue in the business with said Oliver as a copartner, but they changed their views and concluded to sell out to plaintiffs and quit the business.

That during the years 1873 and 1874 the defendant shipped the
86 plaintiffs' lumber, and paid them cash, amounting in the aggregate to fourteen thousand eight hundred and twenty-seven dollars and sixty-nine cents, and that this amount is the net products of the lumber so received by said plaintiffs, and cash paid by the defendant.

That during the said years 1873 and 1874 the market price for selling lumber on the Chicago market was two and one-half per cent. of the gross proceeds of the sale, and the commission merchants guaranteeing the sales, and that it was almost impossible to estimate the damages for refusing to send and deliver to the said plaintiffs the said three million eight hundred thousand feet heretofore mentioned because of the usual quaranty of sales, and that the same kind and quality of lumber was sold on said market during the season of 1873 for a larger average sum per thousand feet, board measure, than said plaintiff sold the lumber of said defendant for.

And thereupon said defendant produced CHARLES DAVIS, who was sworn in behalf of said defendant, Edgar L. Gray, who testified as follows:

Q. Were you engaged in selling lumber in 1873 in Chicago?
A. Yes.
Q. Where did you live?
A. I resided in Chicago.
Q. How much did you sell that season?
A. From eighteen to twenty millions.
Q. Whose lumber was it?
87 A. It was our owne, the Mason Lumber Co., or Davis & Mason.
Q. What kind of lumber was it?
A. Well, it was white pine, and some Norway.
Q. What was the quality of it?
A. Well, it was a fair stock of mill-run lumber.
Q. Any better than the average on the market?
A. I think not. No, sir. A fair average on the Muskegon market.
Q. Can you tell what the average price of lumber was; such kind of lumber as you speak of, ordinary lumber in the market?
A. Well, I cannot in gross; I can give the net sales of our business that year.
Q. Well, were your sales just about the market price?

A. Yes, sir.
Q. About the fair market price?
A. Our net average——
M'r SMILEY. Are you asking about the market price?
M'r VAN ARMAN. Yes.
M'r SMILEY. I object to this for the reason that it don't appear that he knows anything about this lumber or that this lumber was like his or that it bears any comparison whatever. We know as a matter of fact that it did not come from the same section of country or from the same stream or from the same locality, and that it is a well known fact that there is a vast difference between these things. I submit it is entirely incompetent.

88 M'r VAN ARMAN. The object is to show that the lumber we sent there was sacrificed by the pl'ff, sold entirely below the market, and we shall urge that as an excuse for sending no more.

The COURT. Anything set up in the pleadings of that sort?
Mr. SMILY. Nothing whatever.
Mr. VAN ARMAN. No, sir; but they have set up that they have fulfilled their contract, and I seek to show that they did not, that they were to sell the lumber for the best price they could get for it, and I seek to show that they did not do any such thing.
The COURT. Our present impression is, that it would be necessary for you to set up such a defence as that, if you desire to introduce this general testimony. You may show that they did not perform their contract.
Mr. VAN ARMAN. Can we not show what the ordinary price obtained on the market was?
By the COURT. Of such lumber as this; but all this witness says is that the lumber was Muskegon lumber.
Mr. VAN ARMAN. I will show it is exactly the same kind of lumber as this.
The COURT. Very well.
Q. Did you sell strips, and siding, and piece stuff?
A. Yes; boards, strips, and piece stuff.
Q. Have you got the average price for which it was sold during each month?
A. No; I have not.
Q. Have you for the season?

89 A. I have the season average.
Q. What was it for strips?

A. Well, I have not that, boards and strips; it is in total, and piece stuff altogether.
Q. What was it?
Mr. SMILEY. I object to it, as it does not throw any light on it at all.
(Obj. sustained.)
Q. Mr. Davis, is there really in that market any difference in the price at which lumber sells, whether it comes from Muskegon, or whether it comes from one part of the land or country along the Muskegon or another?
A. Well, it depends upon the quality entirely; there is not very much difference between cargoes of about the same quality, whether they are from one place or another.
Q. Is Newaygo County upon the Muskegon River?
A. Yes, sir.
Q. Is there any difference between lumber coming from Newaygo County, which lies on the Muskegon River, and lumber coming from

other counties that lie on the Muskegon River, of that kind, merely because they come from different parties?

A. Well, there would be some difference in the quality of the lumber in the same town.

Q. It depends not upon where the lumber comes from, but upon the quality of the lumber?

A. Yes, sir.

Q. The lumber is all classified there?

A. Yes, sir.

90 Q. Now, Mr. Davis, the kind of lumber that you sold there, did it differ materially from ordinary mill run-lumber?

A. No, sir.

Q. By the cargo?

A. It was an average stock of Muskegon lumber.

Q. Muskegon River lumber, you mean?

A. Muskegon River lumber, yes.

Q. An ordinary stock or lot of Muskegon River lumber?

A. Yes, sir.

Q. Consisting of boards, strips, and piece-stuff?

A. Yes, sir; piece-stuff we made from the coarser logs, the Norways, principally.

Q. Now what was the average price in the market of such lumber as that of yours?

(Objected to by counsel for the plaintiffs, which objection was sustained, and the answer was then and there excluded and ruled out by the court, to which ruling and decision the defendant did then and there except by his counsel.)

Q. Did you sell lumber in the month of July?

A. Yes, sir.

Q. What were the average of your sales of the lumber that I have described in that month?

(Mr. Smiley, counsel for the plaintiff, objected on the grounds heretofore stated, which objection was sustained by the court, to which ruling and decision of the court the counsel for the defendant did then and there except.)

Q. Did you for the month of August?

A. Yes, sir.

91 Mr. VAN ARMAN, counsel for the defendant. I put the same question for that month. What was the average of the sales? to which question the plaintiffs then objected, which objection was sustained by the court, and the said court then and there declared and delivered its opinion that the evidence was improper, and rejected the said evidence, as inadmissible, to which opinion and decision of the said court the counsel for the defendant did then and there, on behalf of said defendant, except. The court: You may consider it put in every month of the season and overruled.

(Objection sustained, and exceptions by Mr. Van Arman.)

Mr. VAN ARMAN, counsel for the defendant. The question is considered as having been put for each month in the season and objected to, and the objections sustained and an exception to it; and the court did then and there declare and deliver its opinion, that the evidance so offered on every month of the season of 1873 was improper, and rejected the same as inadmissible, to which opinion and decision of said court the counsel for said defendant did then and there on behalf of said defendant except.

Said defendant introduced further evidance tending to show that on or

about the 12th day of July, 1873, Walace W. Dickenson and Wolf Williams gave the defendant an order upon the plaintiffs for the sum of four hundred and forty-six dollars and fifty-seven cents, which
92 said plaintiffs received from the defendant Gray, by mail, on or about July the 12th, 1872, which order, in effect, requested them to take out of the proceeds of the sales of the share of the lumber of said Dickenson & Williams the said sum last mentioned, and pay the same to said Gray. That at this time the said Dickenson & Williams and said defendant were shipping to said plaintiffs lumber by them jointly owned, Gray owning one-half thereof, and Dickinson & Williams the other half, and that said Gray informed said plaintiffs, within about a year after said order was drawn, that they had credited him two hundred and twenty-three dollars and twenty-three and one-half cents less than he was entitled to—in other words, had taken out of his half of a cargo of lumber the sum last named, whereas the whole of said sum of four hundred and forty-six dollars and fifty-seven cents should have been taken out of the net proceeds of the said Dickinson and Williams' lumber, and that enough lumber was shipped by Dickenson & Williams and said Gray to amount to the sum of one thousand dollars and upwards. The said order itsself was not produced in evidance.

Said Gray gave further evidence tending to show that Watson & Oliver never signed any duplicates of said five million contract, and introduced a letter from Watson & Oliver to him, enclosing said contract signed by Gray, a copy of which letter is as follows:

93 CHICAGO.

E. L. GRAY, Esq.:

DEAR SIR: Enclosed please find contract, which we send for your signature. You will notice a blank space left on the fourth page, where you will fill in the marks you are using on your logs. The writer has probably used some numbers to express his intention. Mr. Watson says you are a good scribe, so that if you wish a copy signed you may draw it off and we will sign it.

Yours truly,

WATSON & OLIVER.

The said defendant then introduced in evidence five letters written by Blanchard, Borland & Co. to the said defendant, conserning the shipment of said lumber, of which the following are copies:

CHICAGO, *April 21st*, 1873.

E. L. GRAY, Esq.:

DEAR SIR: Yours of the 18th at hand. We advise delay in shipments. No one seems ready to buy yet. Lumber is opening low, 111—very low. We had rather take chances on prices weeks hence
94 than now. Aside from other causes, the condition of the roads puts a stop to all country business.

Yours,

BLANCHARD, BORLAND & CO.

CHICAGO, *June 11th*, 1873.

E. L. GRAY.

DEAR SIR: Yours of the 9th at hand. Whilst a few thick uppers, say 5,000 in a cargo, are all right, we advise all our folks to cut no more

than that, and we think it just as well if they cut all strips; the reason is this, country dealers do not buy thick clear to any large extent, as the doors, sash, I see ready made, and carpenters work up very little clear. The city trade like wide clear, but will pay no more than for strips. Our market is dull and declining, some common cargoes being sold for $9.00.

Of course this effects good cargoes as fully as if a good cargo is common.

Yours,

BLANCHARD, BORLAND & CO.

CHICAGO, *Sept.* 23*d*, 1873.

E. L. GRAY, Esq.:

95 D'R SIR: This is to apprise you of an exceedingly dull lumber market. Buyers are completely frightened off, and lumber drags with out bids, and without purchasers.

The gipsey sold for $9.50, after holding two days; the only other offer we had was $8.50.

Had it been sweetened with 10 to 20 timber, could have placed it yesterday at $10.

We have written Sweet & Taylor to cut piece stuff into 50% scantling, and 20 to 25% small timber, balence joist and 4-4 & 4-6; this is what the market wants now.

Until finances become thoroughly settled we cannot tell how lumber will sell.

We anticipate a large fleet here to-morrow, and do not know how it will be disposed of.

Yours truly,

BLANCHARD, BORLAND, & CO.

CHICAGO, *Sept.* 27*th*, 1873.

E. L. GRAY, Esq.:

DEAR SIR: We report a "quiet" market. Nothing selling except at low prices, and to be paid for when the buyer can get the money.

96 We sell to buyers who are thought good, and make up acc't of sales when we get our money.

D. Newhall bought $15, "a luck*e*y sale."

Herald not yet sold; best offer is $8 straight. We advise manuf'rs not to ship, and we are not sending out vessels except especially ordered.

Yours truly,

BLANCHARD, BORLAND & CO.

CHICAGO, *Oct.* 4*th*, 1873.

E. L. GRAY, Esq.:

DEAR SIR: The Newhall sold for $14.25 cash, when we can get it; the market does not improve much.

The past 2 days evinced more activity, but to-day there is extreme dullness, and 50 cents off one price.

The dealers here are generally sending no vessels back, as it is almost impossible to sell for cash.

Yours truly,

BLANCHARD, BORLAND & CO.

And thereupon defendant rested.

The plaintiffs on rebutal introduced evid*a*nce tending to show, and the book'eeper of plaintiffs testifies, that he and plaintiffs understood the order to direct that Gray was to first receive the sum of $4.46 from the

net proceeds of the said cargo of lumber, and the balence of the
97 proceeds of said cargo was to be divided equally between Gray and Williams & Dickinson; that he so made the entries; that they sent an account of sales of said cargo of lumber to the defendant, one half of which was owned by said Dickinson & Williams, and one half by said defendants. After they received said order from Gray by mail, in the month of July, 1873, in which it appeared that they took the amount of said order from out of the net proceeds of said sale instead of out of the net proceeds of said Dickinson & Williams' one-half interest therein, and credited the same to Gray, and the defendant made no objection to said statement of account ever afterwards, and that they had settled with Dickinson & Williams; that the former ha l become insolvent; that the latter had gone to Texas; that they had paid them for the avails of the lumber that they had sold for them, and settled with them on the basis of the statement which plaintiffs sent E. L. Gray.

It was agreed as a fact in the case that 2 and ½ per cent. on the gross amount of sales was the usual and regular market price for the sale of lumber on commission in Chicago, the commission merchant guaranteeing sales, at the time this contract was made and while it was being executed, and that this was the regular price, whether any advances were made by the commission merchant or not.

98 On the trial the several items of the plaintiffs' account against the defendant, as claimed by the plaintiffs, were not controverted except as to commission on lumber not delivered, and the several items of defendant's account against the plaintiffs, and which constituted his set-off, were not disputed by plaintiffs, except the item of $446, arising out of the transaction concerning the cargo of lumber belonging to Dickenson & Williams and Gray, jointly, and the order in reference thereto, which plaintiffs claim should be $223, instead of $446, as claimed by Gray.

And thereupon the counsel for the said plaintiffs rested their case, and the counsel for said defendant rested his case. And thereupon counsel for the plaintiffs moved to amend the second count of their declaration, for the reason that the five million contract introduced in evidence appeared to be only signed by the defendant, the plaintiffs supposing that the said defendant had secured a duplicate of said contract signed by said plaintiffs, to which motion counsel for the defendant objected; said court then and there overruled said objection, and allowed said declaration to be amended upon that point, and made the following order:

Circuit court of the United States, for the sixth circuit and western district of Michigan.

99 WILLIAM BLANCHARD, JOHN J. BORland, and Horatio G. Billings
vs.
EDGAR L. GRAY.

In this cause, upon application and motion of the plaintiffs for leave to amend the second count of plaintiffs' declaration, and after argument of counsel, it is ordered that the plaintiffs have leave, and leave is hereby granted for them to amend the said second count, so as to allege that said contract declared upon was signed by the said defendant, Gray, only, and that the same said contract was accepted and acted upon by the said Watson & Oliver as a contract of the said Gray with the said Watson & Oliver.

To which said counsel for said Edgar L. Gray did then and there except; and which amendment to said declaration was made accordingly; and thereupon the counsel for the said defendant, Edgar L. Gray, did then and there request the court, in writing, to charge and instruct the jury as follows:

First. That the plaintiffs must prove the contract as set forth by them in the declaration, and they having alleged that the defendant's promises were made in consideration of their undertakings to perform the agreements of Watson & Oliver, their failure to prove said agreements, as alleged, is a fatal variance, and the plaintiffs on that ground alone could not recover.

Which said request of counsel for defendant said court did then
100 and there decline to grant, and did then and there refuse to charge and instruct said jury; to which ruling and refusal to charge, counsel for defendant did then and there except.

And thereupon the counsel for said defendant did then and there, in writing, request said court to charge and instruct the jury as follows:

Second. That subsequent acts of the parties do not dispense with the proof of the agreement as set forth and the declaration alleging the making of a contract between pl'ffs and def's, at, to wit, Newaygo, Mich. It must be proved as laid.

Which said request of counsel for defendant said court did then and there decline to grant, and did then and there refuse so to charge and instruct said jury; to which ruling and refusal to charge, counsel for defendant did then and there except.

And thereupon the counsel for said defendant did then and there, in writing, request said court to charge and instruct the jury as follows:

Third. The promises of pl'ffs and def'ts must under the declaration be proven to have been made concurrently, and at the same time to be obligatory upon the defendant, and if you find that there is no proof upon that point, there is a fatal variance between the contract, as stated in the pleadings, and the proofs.

101 Which said request of counsel for defendant said court did then and there decline to grant, and did then and there refuse so to charge and instruct said jury; to which ruling and refusal to charge, counsel for defendant did then and there except.

And thereupon the counsel for said defendant did then and there, in writing, request the said court to charge and instruct the jury as follows:

Fourth. That unliquidated damages do not draw interest.

Which said request of counsel for defendant said court did then and there decline to grant, and did then and there refuse so to charge and instruct said jury; to which ruling and refusal to charge, counsel for defendant did then and there except.

And thereupon the counsel for said defendant did then and there, in writing, request said court to charge and instruct the jury as follows:

Fifth. That the contract only provides for interest on advances at the rate of ten per cent., and that defendant is only bound to pay interest at ten per cent. on the item of the $5,000 note and draft of $4,000, and that the balance of the advances could only draw 7 per cent. interest, as the defendant by the contract only agreed to pay interest at ten per cent. on advances up to the sum of $9,000.

102 Which said request of counsel for defendant said court did then and there decline to grant, and did then and there refuse so to charge and instruct said jury; to which ruling and refusal to charge, counsel for defendant did then and there except.

And thereupon said court proceeded to, and did, instruct the jury as follows:

"The contract introduced in evidence having been assigned to the plaintiffs by Watson & Oliver, and by the consent of the defendant, in December, 1872, the plaintiffs occupied the place and are entitled to the rights of Watson & Oliver under the contract."

To which said instruction and charge, so as aforesaid given by the said court to the said jury, the said counsel for the defendant did then and there except.

And thereupon the said court proceeded to, and did, instruct and charge the jury as follows:

"Now, as to the question of usury, we discover nothing in the contract which indicates an usurious agreement, and there are no proofs tending to show that the agreement by the defendant to pay two and one-half per cent. commission was a device to cover an usurious promise; on the contrary, the value of services for selling lumber on commission at Chicago seems to be clearly established to have been worth two and one-half per cent.; hence, we instruct you that the contract was not usurious. We prefer to take the entire responsibility of that question that the jury may have no difficulty with it."

103 To which said instruction and charge, so as aforesaid given by said court to said jury, said counsel for defendant did then are there except.

And thereupon said court proceeded to, and did, instruct and charge the jury as follows:

"We instruct you, therefore, that the damages in this case, if plaintiffs are entitled to recover, would be the gain which the plaintiffs would have made in selling the lumber not delivered, had it been forwarded by the defendant, the gain which plaintiffs would have made in selling the lumber of defendant not delivered. This gain is the difference between the contract price of selling and the cost of selling; it was this difference that induced plaintiffs to enter into the contract, and to assume the agreement of Watson & Oliver, and constitutes the gain or profit of which plaintiffs were deprived by defendant's failure to carry out his contract."

To which said instruction and charge, so as aforesaid given by the said court to the said jury, *and* said counsel for the defendant did then and there except.

And thereupon said court proceeded to, and did, instruct and charge the jury as follows:

"If plaintiffs and those engaged in the same business had to make contracts in the fall and winter, and arrange their expense account for the season, by employing men and otherwise, for the next season's business, and could have sold the lumber that the defendant failed to

104 deliver under this contract without any extra cost or expense over the cost and expense of selling the lumber which they did sell, then the damages would be two and one-half per cent. commission that the plaintiffs were to receive on the market price of the lumber; in other words, if the plaintiffs could have sold the lumber which defendant failed to deliver, without any extra or further costs than they were to in selling what lumber they did sell that season in their commission business, then the plaintiffs would be entitled to two and one-half per cent. commission on the lumber not delivered, precisely as though they had sold it."

To which said instruction and charge, so as aforesaid given by the said court to the said jury, the said counsel for the defendant did then and there except.

And thereupon the said court proceeded to, and did, instruct the jury as follows:

"Defendant failed to deliver 3,844,133 feet of lumber contracted by him to be delivered according to the testimony, and about which, I believe, there is no dispute. Ascertain the average market value at which it would have sold if it had been delivered, and then the sum which said lumber would have produced, and this sum multiplied by the difference between the contract price for selling and the cost of selling gives the damages sustained by the plaintiffs."

105 To which said instruction and charge, so as aforesaid given by the said court to the said jury, the said counsel for the defendant did then and there except.

And thereupon the said court proceeded to, and did, instruct and charge the said jury as follows:

"In order to defeat the plaintiffs' right of recovery on the ground that they sold the defendant's lumber below the market price, you must be satisfied that the sales made by the plaintiffs were materially below the market price in Chicago, the price that ought to have been realized, and could have been, by reasonable efforts on the part of the plaintiffs. In this connection we instruct the jury that the plaintiffs were not bound to sell defendant's lumber on credit. If they sold for the market price in cash, they did all they were bound to do under the contract. The question is not whether some other lumber-dealer or commission-merchant got more for lumber in Chicago that season, or could have got more for defendant's lumber than plaintiffs did, but whether the plaintiffs sacrificed the defendant's lumber, or his interests, by selling materially below the market price of lumber; if so, the defendant would have a right to protect himself by a refusal to continue the delivery of lumber. In other words, he would not be bound to stand and see his property sacrificed, and be left only to his remedy by action for damages. If the plaintiffs are entitled to recover, then an important question is as to the measure of damages."

106 To which said instruction and charge, so as aforesaid given by the said court to the said jury, the said counsel for defendant did then and there except.

And thereupon the said court proceeded to, and did, instruct and charge the jury as follows:

"As to claim by defendant of $223 and some cents, we instruct you that if the plaintiffs acted upon instructions received as to the proceeds of the same of the cargo shipped by Dickenson & Williams as they understood those instructions to be, and acting on those instructions transmitted an account of the sales of that cargo to the defendant, stating what they had done, and if defendant neglected for a year or for any unreasonable time to inform plaintiffs of the error which he made claim to have existed, and the plaintiffs were induced on account of defendant's silence to believe that they had acted as they were instructed to do, and settled and paid all the parties interested in the cargo, the proceeds, defendant is estopped from setting up any claim in reference to this particular item. In other words, whatever the instructions may have been, that those instructions were acted upon by the plaintiffs, and the defendant informed of that action, and he did not notify the plaintiffs of any error which he claimed to exist or which in fact did exist, and by reason of his silence plaintiffs were induced to settle with other parties who had a claim upon the proceeds of that cargo, so that when this matter, a long time subsequent, came to the knowledge of the plaintiffs, as to the claim of defendant, it was out of their power to rectify

107 the matter with the defendant, that the defendant is estopped

from setting up any such claim; he should have made it seasonably. The only question is, whether he made this representation and notified the plaintiffs seasonably in reference to this claim, and while it was within their power to correct it, and make the defendant whole."

To which said instruction and charge, so as aforesaid given by the said court to said jury, the said counsel for the defendant did then and there except.

And thereupon said court proceeded to, and did, instruct the jury as follows:

"They, plaintiffs, were bound to sell the lumber at the market price; and if they did not do so, if there was a material injury in consequence of such want or failure to sell at the market price, the defendant would be justified in considering that and refusing to deliver more lumber; but we think, in connection with that, that the jury will consider or should consider that during all the season, from some time in June until into November, the defendant was continually shipping lumber to plaintiffs, and was from time to time, as each cargo was sold, from week to week, and month to month, as the case was, was advised as to the price which the cargo brought."

To which instruction and charge, so as aforesaid given by the
108 said court to the said jury, the said counsel for the defendant did then and there except.

And the said court, under the charge, and with the directions aforesaid, left the said issue to the said jury; and the said jury, after retiring and considering the case, returned into court, and then and there gave their verdict for the said plaintiffs, and assessed their damages at the sum of eleven hundred and thirteen dollars and seventy-one cents.

And because none of the said exceptions so offered and made to the opinions, decisions, rulings, and refusals to charge, and to the charge of the said circuit judge, do appear upon the records of said trial, therefore on the prayer of the said defendant, by his said counsel, with the leave of the court, that the said exceptions be made of record, and that he have his bill of exceptions thereto, which leave was granted by the honorable court, and this, the bill of exceptions of the defendant to said rulings and decisions of said court, and during the course of the trial, and to the charge of the court, was then and there signed and sealed by the honorable court. And the said judge hath to this bill of exceptions put his hand and seal, according to the statu'e in such case made and provided, this 19th day of June, 1877.

S. L. WITHEY,
Dis't Judge.

THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Chester B. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true copy of the files and records of the proceedings of said court in said entitled cause, and of all of them.

Witness my official signature and the seal of said court, in Grand Rapids, this 26th day of September, in the year of our Lord, one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL, *Clerk*,
By A. B. CARRIER, *Deputy.*

(Indorsement on cover:) No. 583. Edgar L. Gray, plaintiff in error, vs. William Blanchard, John J. Borland, & H. G. Billings. W. Michigan C. C. U. S. Filed 26th October, 1877.

UNITED STATES OF AMERICA.

The Supreme Court,

OF THE UNITED STATES.

EDGAR L. GRAY,
Plaintiff in Error.
vs.
WILLIAM BLANCHARD.
JOHN J. BORLAND and
HORATIO G. BILLINGS,
Defendants in Error.

Brief and Points on Motion to dismiss Writ of Error.

HUGHES, O'BRIEN & SMILEY,
Counsel for Def'ts in Error.

Eagle Job Rooms—W. C. DENNIS & CO.
September, 1878.
GRAND RAPIDS, MICHIGAN.

UNITED STATES OF AMERICA.

The Supreme Court,

OF THE UNITED STATES.

EDGAR L. GRAY,
Plaintiff in Error.

vs.

WILLIAM BLANCHARD.
JOHN J. BORLAND and
HORATIO G. BILLINGS,
Defendants in Error.

And now come the said defendants in error by Hughes, O'Brien & Smiley, their attorneys and counsel, and move the court now here, that the writ of error in this case be dismissed and the said cause be dismissed from this court, and remanded to the court below, for the reason that this court has no jurisdiction of the said cause.

First. For that it should appear, and does not from the record in said cause, that the matter in dispute exclusive of costs, between the parties was and is the sum, or of the value of five thousand dollars.

Second. For that it appear from the record in said cause that the matter in dispute between the parties in said action, was, and is of a less sum and of less value than five thousand dollars.

Said motion will be based upon the records and files, bill of exceptons and return of the clerk in said cause on file therein.

Dated, August 23d, 1878.

HUGHES, O'BRIEN & SMILEY,
Attorneys and of Counsel for the
Defendants in Error.

The Supreme Court of the United States:

EDGAR L. GRAY,
Plaintiff in Error.
vs.
WILLIAM BLANCHARD, et al.,
Defendants in Error.

STATEMENT OF THE CASE.

On September 13th, 1872, the defendant entered into a contract with Watson & Oliver, who were Lumber Commission Merchants in Chicago, which provided that defendant would ship them, to sell on commission, six (6) million feet of lumber to be sold during the season of 1872–3.

Watson & Oliver were to make advances upon the lumber to the amount of eleven thousand, four hundred dollars, ($11,400,) they were to sell the lumber as it arrived, repay to themselves the advances with interest at ten (10) per cent,, and deduct commissions at two and one half ($2\frac{1}{2}$) per cent. on the gross amount of sales; pay saw bill, freight, tallying, measuring and tow bills, and remit the balance to Gray.

The contract provided that, if Gray failed to deliver any part of the six million (6,000,000) feet of lumber, he should be liable to pay forty (40) cents per thousand for such as he did not deliver.

Watson & Oliver, with the consent of Gray, assigned this contract to the plaintiffs, who were commission Merchants in Chicago.

The parties operated under this contract, the plaintiffs made advances, Gray furnished lumber to the amount of over two million (2,000,000) feet, but failed to deliver three millions, eight hundred and forty-four thousand, one hundred and thirty-three (3,844,133) feet of the six millions contracted.

The plaintiffs sold the lumber furnished, paid bills as per contract, and remitted to Gray.

Upon Grays failure to deliver the full amount of lumber contracted, the plaintiffs brought this action to recover the commissions of two and one half ($2\frac{1}{2}$) per cent. or forty cents per thousand or whatever thereof they should be entitled to, on account of Gray's failure to deliver the lumber to them for sale.

The plaintiffs declared upon this contract and alleged the non-delivery of said lumber, claiming damages and adding the common counts.

The defendant plead the general issue and gave notice of set-off to the amount of ten thousand dollars ($10,000.)

The Bill of Exceptions contains the following statement:—"On the trial, the several items of the plaintiff's account against the defendant, as claimed by the plaintiffs were not controverted, except as to commission on lumber not delivered, and the

several items of defendants' account against the plaintiffs, and which constituted his set-off, were not disputed by plaintiffs, except the item of four hundred and forty-six dollars ($446) arrising out of the transaction concerning the cargo of lumber, belonging to Dickinson and Williams and Gray jointly, and the order in reference thereto, which plaintiff claimed should be two hundred and twenty-three dollars, ($223) instead of four hundred and forty-six dollars, ($446) as claimed by Gray. See Record p. 35. folio 98.

The plaintiffs claimed forty (40) cents per thousand commissions on the three million, eight hundred and forty-four thousand, one hundred and thirty-three 3,844,133) feet of lumber not delivered, amounting to one thousand five hundred thirty seven dollars and sixty-five cents, ($1,537.65.)

The plaintiffs secured a judgment against the defendant for the sum of one thousand one hundred and eighteen dollars and seventy-one cents, ($1,118.71.)

BRIEF AND ARGUMENT IN SUPPORT OF THE MOTION TO DISMISS.

In this case the defendant in the court below, takes out the writ of error. To give this court jurisdiction, it must appear that the amount in dispute exceeds the sum of five thousand dollars.

The plaintiff only recovered the sum of $1,118.71, and as a general rule that fact would defeat the jurisdiction of this court where the case is sought to be brought here by the defendant.

Gordon vs. Ogden, 3 Pet. 33.
Knapp vs. Banks, 2 How. 73.
Walker vs. United States, 4 Wall 163.
Merrill vs. Petty, 16 Wall 338.

The only ground upon which the defendant claims that the matter in dispute exceeds the sum of five thousand dollars, is as we understand it, that he plead a set-off as a counter claim, and asked a judgment in his favor for ten thousand dollars.

If his set-off had been rejected, or if his set-off although admitted and allowed, had been overbalanced by items of the plaintiffs account, which were disputed by the defendant, there might be some ground for the defendant's position.

The record shows however, that his items of set-off were not disputed, and that they were not overcome by disputed items of the plaintiffs' account.

It cannot be said that matters or items which are conceded or "not controverted," are in *dispute*.

To determine the amount in dispute, the court will examine the whole record; it will not be sufficient that it appears that the plaintiff claimed more than the jurisdictional amount in his declaration; if it appear that the plaintiff could in no event recover the jurisdictional amount, he cannot prosecute his suit in this court.

See Schacker vs. Hartford Fire Ins. Co., 93 U. S. 241
Stinson vs. Douseman, 20 How. 461.
Lee vs. Watson, 1 Wall 337.
Sampson et al., vs. Welch et al., 24 How. 207.
Sewall vs. Chamberlain, 5 How. 6.

It distinctly appears in the record in this case, that the plaintiff's claim in dispute did not exceed $1'537.65, all his other items having been admitted.

It also distinctly appears that the defenpants' claim in dispute did not exceed the sum of $223, all the other items of

his account having been admitted, so that if we add the disputed items on both sides together, we only have the sum of $1,760.65.

If it should appear in a case, that the defendant who had plead set-off to the amount of six thousand dollars, had offered no evidence of a claim to exceed one thousand dollars, it could not be claimed that the set-off in dispute amounted to more than one thousand dollars, and that because he plead set-off to the amount of six thousand dollars, that amount was *in dispute.*

This rule obtains when the plaintiff declares for an amount in excess of $5,000, and only attempts on the trial to recover upon a less sum.

See Schacker vs. Hartford Fire Ins. Co., 93 U. S. 241, cited above.

So where the mutual items of account are admitted on each side, they cannot be said to be in dispute.

In United States vs. McDowell, 4 Cr. 316, the plaintiff declared for $20,000, the penalty of a bond; the defendant pleaded performance generally; the plaintiff replied assigning a special breach of the bond in not paying over to the United States $328. The judgment being for the defendant, the plaintiff sued out a writ of error, but this court held that it had no jurisdiction, because it was evident that the amount in dispute was only $328.

In Terry vs. Hatch 93 U. S. 44, an equity case, this court examined the whole record from the bill to the decree, for the purpose of determining whether the amount in dispute exceeded the jurisdictional amount.

The case of Ryan vs. Bindley 1 Wall 66, is not an authority against our position.

In that case the defendant's set-off not only exceeded $2,000 the amount then required to give this court jurisdiction, but the whole sum of his set-off was in dispute; it was not admitted or allowed.

We apprehend that if it had appeared in that case that the defendant's set-off was not disputed, but allowed him on the trial and had been overcome by claims of the plaintiff, in no manner disputed, as in this case, the court could not have said that it had jurisdiction.

This case stands so far as any dispute is concerned, precisely as though the plaintiff had only declared for the $1,537. 65, commissions on lumber not delivered under the contract, and the defendant had plead a set-off to the amount of $446.

The plaintiff in error is in the position of a plaintiff whose whole claim has been admitted and satisfactorily adjusted, except one item of $446, which was the whole amount in dispute. As plaintiff in error, he practically alleges error in a matter concerning $446, which was the real matter in dispute.

Suppose that a party should bring an action upon six promisory notes for $1,000 each, and upon the trial the defendant should admit the validity of five of the notes, and consent to judgment as to them, but contest only the one; now as matter of fact, the sum of one thousand dollars only is in dispute, and when this fact appears in the record, the court must take notice of it.

The object of the statute is evident. The intention of Congress was to make final the decision of the circuit courts in all unimportant matters, and to give an appeal or writ of error to this court, only when the *disputed* matter exceeded in value

five thousand dollars. The language employed clearly shows their intention not to extend the jurisdiction to all cases where the suit involved accounts to the amount of upwards of five thousand dollars, but to extend it only to cases where the *disputed matters* exceed five thousand dollars.

In this case under the pleadings, more than five thousand dollars might have been in dispute, but the record shows that less than that sum was actually in dispute.

HUGHES, O'BRIEN & SMILEY,
Counsel for Deft's in Error.

SUPREME COURT

OF THE UNITED STATES.

EDGAR L. GRAY,
Plaintiff in Error,
vs.
WILLIAM BLANCHARD,
JOHN J. BORLAND, AND
HORATIO G. BILLINGS,
Defendants in Error.

Brief and Points in Reply to Motion to Dismiss Writ of Error.

J. W. STONE, Counsel for Plaintiff in Error.

GRAND RAPIDS:
W. W. HART, ARCADE STEAM BOOK AND JOB PRINTING HOUSE.
1878.

The Supreme Court

OF THE UNITED STATES.

EDGAR L. GRAY,
Plaintiff in Error,
vs.
WILLIAM BLANCHARD,
JOHN J. BORLAND, AND
HORATIO G. BILLINGS,
Defendants in Error.

STATEMENT OF THE CASE.

A motion has been made to dismiss the writ of error because this court has no jurisdiction over the case.

The defendant below has sued out the writ of error, and contends that the matter in dispute is not determined by the judgment, but by the sum claimed in the counter-claim or set-off interposed by him in the court below.

The plaintiffs below brought suit, and declared upon an express contract and claimed $5,000 damages.

The defendant below plead the general issue and gave notice of set-off claiming $10,000.

The bill of exceptions contains the following statement: (See Record, printed page 25.)

"That by the laws of the State of Michigan such a defence is permitted, and if the defendant succeeds in proving his set-off, and it is larger than the plaintiffs claim, he is entitled to a judgment for the excess. That the parties are concluded by the judgment, and cannot again litigate the same subject matter, unless the judgment should be reversed. This law of set-off, and the practice under it, has been adopted, and is the rule and the law of the Circuit Court of the United States for the Western District of Michigan."

The statute of Michigan upon the subject of set-off or counter-claim is as follows:

"Sec. 5797. To entitle a defendant to a set-off, he must annex a notice thereof to his plea of the general issue."

"Sec. 5798. If the amount of the set-off duly established be equal to the plaintiff's debt or demand, judgment shall be entered that the plaintiff take nothing by his action. If it be less than the plaintiff's debt or demand the plaintiff shall have judgment for the residue only."

"Sec. 5799. If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered for the defendant for the amount thereof; but no such judgment shall be rendered against the plaintiff when the contract which was the subject of the

suit shall have been assigned before the commencement of the suit, nor for any balance due from any other person than the plaintiff in the action."

BRIEF AND ARGUMENT IN REPLY TO THE MOTION TO DISMISS.

I.

It is well settled that when the judgment is for less than five thousand dollars, and the plaintiff sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration exceed that sum.

If it is true that the plaintiff may sue out the writ when he recovers less than $5,000, if he claims more than that sum in his declaration, it follows by parity of reasoning that a defendant who has interposed a set-off amounting to over $5,000 is entitled to the writ upon the same ground; for he is a plaintiff so far as the set-off is concerned.

The practice of set-off has been allowed to avoid a multiplicity of suits.

The set-off claimed by the defendant below—plaintiff in error—may still be allowed and recovered, should the judgment below be reversed, and consequently the whole sum claimed by the notice of set-off is still in dispute.

No bill of particulars was ever demanded of or furnished by defendant below, hence he is not limited in his offer of proof to any particular items.

As appears by the Record (see Record, printed page 30), during the years 1873 and 1874, the defendant shipped the plaintiffs' lumber, and paid them cash amounting in the aggregate to $14,827.69. How much of this was lumber and how much was cash does not appear.

By matter in dispute is meant the subject of litigation, the matter for which the suit is brought, and upon which the issue is formed.

Lee vs. Watson, 1 Wall. 339.

While the declaration must be taken generally as fixing the amount, or value, for the purposes of determining the jurisdiction of this court, yet the subsequent pleadings may so change the original character of the suit as to involve an amount, or value in excess of $5,000, and when this is done the judgment is subject to be reviewed in this court.

Ryan vs. Brindley, 1 Wall. 66.
Thompson vs. Butler, 95 U. S. Rep. 694.

This is the case here. In an action at law for damages, the court will not look beyond the pleadings to determine the question of the amount in dispute.

We think no case at law for damages can be found where this court has ever gone further than the pleadings to settle this point. Still if in the body of the declaration the plaintiff does not claim over $5000, and it clearly appears that the plaintiff's demand does not exceed that sum, this court has no jurisdiction, although the *ad damnum* is in excess of the sum of $5,000, because it appears on the *face* of the pleadings that the amount in dispute is less than that sum.

This is the doctrine announced by this court in the following cases cited by counsel for defendants in error:

Lee vs. Watson, 1 Wall. 337.
Schacker vs. Hartford Fire Ins. Co. 93 U. S. 241.
Sewall vs. Chamberlain, 5 How. 6.

In the case at bar the face of the pleadings shows that more than $5,000 is in dispute; and this we think is the true test in actions at law for damages.

Where the amount in controversy is a claim for damages, the pleadings should show jurisdiction.

But in actions of replevin, ejectment, suits for dower, admiralty cases, equity cases, and the like, where the value does not appear in the pleadings, the practice is to allow affidavits to show the value of the subject matter in dispute.

Rush vs. Parker, 5 Cranch 287.
Ex parte Bradstreet, 7 Peters 634.
Richmond vs. Milwaukee 21 How. 391.
The Grace Girdler, 6 Wall 441.

In cases where the value is stated in the pleadings or proceedings of the court, affidavits will not be received to vary it—to give or take away jurisdiction.

Richmond vs. Milwaukee, 21 How. 391.

II.

The counsel for defendants in error insist that the pleadings do not govern, but that they can go behind the pleadings, and show what took place at the trial;

and for that purpose they have had the following clause inserted into the bill of exceptions:

"On the trial the several items of the plaintiffs' account against the defendant, as claimed by the plaintiffs, were not controverted except as to commissions on lumber not delivered, and the several items of defendant's account against the plaintiffs, and which constituted his set-off, were not disputed by plaintiffs, except the item of $446."

And the counsel for defendants in error claim that the record shows that only two things were in dispute at the trial, viz: "Commissions on lumber not delivered," and "the item of $446," and for this reason it is claimed this court has no jurisdiction.

In answer to this position we say that it clearly appears by the record, *aside from the pleadings*, that other and much more important matters were actually contested at the trial.

The plaintiff in error, as the record shows, contested the validity of the contract, and claimed that it was void, for several reason. Although he admitted the several items in the plaintiffs' account against him, he denied the validity of the contract under which they were paid, and the dispute at the trial was not so narrow as the moving parties, in their brief, claim.

It will be borne in mind that there was no bill of particulars demanded of defendant below, and if he did not bring forward all of his items at the trial, he will not be precluded from doing so hereafter. He had the right to

rest his defence on the invalidity of the contract, thinking that the court below would hold in his favor upon that point.

In this he was mistaken. The court ruled against him, and this is the main thing in dispute; and if the plaintiff in error succeeds in this court in having the contract declared invalid, then he will be able to recover under his set-off the sum of $14,870.69, as net proceeds of lumber delivered and cash paid, as appears by the record, (see Record, printed page 30), less however the sum defendants in error have actually paid over, which amount or amounts *do not appear* by the record, and the real value of their services, and the amount of this last item does not appear.

So we insist that even under the view of the counsel for the defendants in error, this conrt has jurisdiction, and it appears by the record, outside of the pleadings, that the matter in dispute at the trial below exceeded $5,000.

But we think that the first proposition is the correct one, that the pleadings should govern.

The court will see upon examination of the record that the questions involved and raised on the merits are important ones, and not of a trivial nature.

J. W. STONE,

Counsel for Plaintiff in Error.